TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 41

LENORE FOMAN, PETITIONER,

vs.

ELVIRA A. DAVIS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 14, 1961
CERTIORARI GRANTED JANUARY 8, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 548

LENORE FOMAN, PETITIONER,

vs.

ELVIRA A. DAVIS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MARCH 13, 1962

[fol. A]

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5808

LENORE FOMAN, Plaintiff-Appellant,

v.

ELVIRA A. DAVIS, Executrix, Defendant-Appellee

Record Appendix to Brief for Appellant and Proceedings to and Including October 26, 1961

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

LENORE FOMAN

v.

THE GOODS, EFFECTS AND CREDITS OF WILBUR W. DAVIS, deceased, now in the hands of Elvira A. Davis, Executrix u/w of Said Wilbur W. Davis.

RELEVANT DOCKET ENTRIES

1960

June 14 Complaint filed (jury).

Aug. 11 Defendant's motion to dismiss, filed.

11 Defendant's answer filed.

Oct. 3 Ford, D.J. Hearing on defendant's motion to dismiss, advisement—10 days in which to file briefs—plaintiff's memo. of law filed.

Dec. 5 Ford, D.J. Hearing on defendant's motion to dismiss, advisement.

16 Ford, D.J. Memorandum of decision on defendant's motion to dismiss—Defendant's motion to dismiss allowed.

19 Ford, D.J. Judgment: After hearing on defendant's motion to dismiss, in said action, and motion having been allowed, and in accordance with the Memorandum of decision, dated Dec. 16, 1960, ordered judgment for the defendant dismissing the complaint. Judgment entered.

20 Plaintiff's motion to vacate judgment on defendant's motion to dismiss, filed.

20 Plaintiff's motion to amend her complaint, filed.

20 Complaint second cause of action, filed.

[fol. 2]

1961

Jan 17 Notice of Appeal from judgment entered Dec 19, 1960, filed by plaintiff.

23 Ford, D.J. Hearing on plaintiff's motion to vacate judgment on defendant's motion to dismiss, motion denied.

23 Ford, D.J. Hearing on plaintiff's motion to amend her complaint (complt. second cause of action filed) denied.

26 Notice of Appeal from denial of above motions of Jan 23, 1961, filed by pltff.

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed June 14, 1960

1. Plaintiff is a citizen and resident of the Town of Riverdale in the State of New York. The Defendant, Elvira A. Davis, is a resident of Melrose, County of Middlesex and Commonwealth of Massachusetts, and is the Executrix under the will of Wilbur W. Davis, late of said Melrose, having been duly appointed and qualified on October 7, 1959, in the Probate Court for the County of Middlesex, Commonwealth aforesaid, Docket No. 356382. The matter in controversy exceeds the sum of ten thousand ($10,000.00) dollars, exclusive of interest and costs.

2. The Plaintiff is the daughter and the only child of the decedent, Wilbur W. Davis. For many years prior to April 1947, Plaintiff's mother, then the wife of the decedent, had been suffering from mental disorders and other illnesses and was a patient in a sanatorium known as Brattleboro Retreat, located in Brattleboro, Vermont. At or about 1947, the decedent attained retirement age, retired from his employment and, thereafter, received a retirement pension. [fol. 3] At that time, the decedent entered into an oral agreement with the Plaintiff by which it was provided that the Plaintiff would thereafter assume and pay all expenses for the care, treatment and maintenance of decedent's wife

(Plaintiff's mother) and would look after and care for her so long as she lived; that in consideration therefor the decedent would make no will and, at his death, would leave no will to the end that the Plaintiff would receive the share of the decedent's estate to which she, as his only child, would be entitled according to the laws of intestacy of the Commonwealth of Massachusetts. The decedent further agreed that he would pay to the Plaintiff, out of his pension, as a contribution toward the support of his then wife (Plaintiff's mother) amounts not to exceed fifteen ($15.00) per month.

3. In accordance with the terms of said agreement, the Plaintiff on or about May 16, 1947, entered into an agreement with Brattleboro Retreat, the sanatorium in which the decedent's wife (Plaintiff's mother) was a patient, substituting herself as the person liable for the care, support and maintenance of the decedent's wife (Plaintiff's mother) in place of the decedent and, thereafter, paid all charges incurred thereat up to and including May 1, 1951. On or about that date, the physical and mental condition of the decedent's wife (Plaintiff's mother) was such that it became advisable to remove her from the said sanatorium. Plaintiff thereupon removed the decedent's wife (Plaintiff's mother) to Plaintiff's own home where she continued to care for and provide support, maintenance, medical attendance and nursing for her until the time of her death in February, 1953.

4. Sometime in 1957, the decedent married Elvira A. Davis, the Defendant named herein. On April 15, 1959, the decedent died.

[fol. 4] 5. Although the Plaintiff has done and performed all things required of her to be done in accordance with her agreement with the decedent, as above set forth, said decedent, in breach of said agreement and contrary to the provisions thereof, made and executed a Last Will and Testament, dated August 5, 1957, which has been duly allowed in the Probate Court for the County of Middlesex, Commonwealth aforesaid, Docket No. 356382. By the terms of said will, the decedent devised and bequeathed his entire estate, except for a bequest of five thousand ($5,000.00)

dollars to his brother, to the Defendant. The decedent bequeathed nothing to the Plaintiff.

6. The total value of the assets of the estate of the decedent is approximately sixty thousand ($60,000.00) dollars. Under the laws of intestacy of the Commonwealth of Massachusetts, the Plaintiff, as the only child of the decedent surviving him, is entitled to an amount equal to two-thirds of the assets of the estate.

7. Wherefore the Plaintiff demands Judgment in the amount of forty thousand ($40,000.00), together with interest and costs.

8. Plaintiff claims trial by jury.

Lenore Foman, By Her Attorneys, Guterman, Horvitz & Rubin, Henry N. Silk.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER—Filed August 11, 1960

First Defense

1. The complaint fails to state a claim against the defendant upon which relief can be granted.
[fol. 5]

Second Defense

2. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first and last sentences of Paragraph 1 of the complaint and therefore denies the same. The defendant admits the other allegations contained in Paragraph 1 of the complaint.

3. The defendant admits the allegations contained in the first three sentences of Paragraph 2 of the complaint, but denies all other allegations contained in Paragraph 2.

4. The defendant denies the allegations contained in Paragraph 3 of the complaint.

5. The defendant admits the allegations contained in Paragraph 4 of the complaint.

6. The defendant admits that Wilbur W. Davis left a will dated August 5, 1957, in which he bequeathed nothing to the plaintiff, being mindful that she is well provided for by her marriage, and in which he bequeathed $5,000 to his brother and the rest of his estate to his wife, the defendant. The defendant also admits that said will has been duly allowed by the Probate Court for the County of Middlesex, Commonwealth of Massachusetts, under docket No. 356382. But the defendant denies all other allegations contained in Paragraph 5 of the complaint.

7. The defendant admits that the gross value of the decedent's estate is approximately $60,000, but says that the net value of the estate is not yet known, and in any event will be less than $60,000. The defendant denies the allegations of the second sentence of Paragraph 6 of the complaint.

Third Defense

8. The agreement between the plaintiff and the decedent, Wilbur W. Davis, which is alleged in the complaint was an [fol. 6] oral agreement and not an agreement in writing signed by said decedent or by a person by him duly authorized. Accordingly, the right of action, if any, set forth in the complaint is barred by the statute of frauds.

Fourth Defense

9. The right of action, if any, set forth in the complaint did not accrue within six years next before the commencement of this action and is barred by the statute of limitations.

Fifth Defense

10. The agreement between the plaintiff and the decedent which is alleged in the complaint is unenforceable because it is lacking in definiteness and mutuality.

Sixth Defense

11. If there ever was an agreement between the plaintiff and the decedent, the plaintiff has been paid in full whatever was due her under such agreement and the defendant owes the plaintiff nothing.

Seventh Defense

12. If there ever was an agreement between the plaintiff and the decedent, the plaintiff abandoned, repudiated and waived it and has estopped herself from recovery under it.

Richard R. Caples, Attorney for Defendant.

[fol. 7]

In United States District Court

Defendant's Motion to Dismiss Complaint —Filed August 11, 1960

The defendant moves the court to dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

Richard R. Caples, Attorney for Defendant.

Memorandum of Decision on Defendant's Motion to Dismiss—December 16, 1960

Ford, D. J.

The complaint in this action alleges an oral agreement in 1947 between plaintiff and her father, the decedent, Wilbur Davis, whereby plaintiff agreed to assume and pay the expenses for the care, treatment and maintenance of her mother, decedent's first wife, and decedent in consideration therefor agreed to leave no will so that upon his death plaintiff as his only child would receive the share of his estate to which she would be entitled under the intestacy laws of Massachusetts. It alleges that plaintiff performed her part of the agreement until the death of her mother in 1953, that thereafter in 1957 decedent married defendant Elvira Davis, that Wilbur Davis died in 1959, leaving an estate of approximately $60, and leaving a will which

has been duly probated and of which defendant is executrix. Except for a bequest of $5,000 to his brother, decedent by the terms of this will devised and bequeathed his entire estate, consisting in part of real estate, to the defendant. Plaintiff seeks damages in the amount of $40,000, the share of his estate she would have received as his only surviving child if he had died intestate.

[fol. 8] Defendant moves to dismiss on the ground that the action is barred by the statute of frauds, Mass. G.L. Ch. 259, §§ 1 and 5, which provide:

> "§ 1. Certain Contracts Actionable Only if in Writing
>
> "No action shall be brought;
>
> * * * * *
>
> "Fourth, Upon a contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them;
>
> * * * * *
>
> "Unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized."
>
> "§ 5. Agreement to Make a Will, etc., to Be in Writing.
>
> "No agreement to make a will of real or personal property or to give a legacy or make a devise shall be binding unless such agreement is in writing signed by the person whose executor or administrator is sought to be charged, or by some person by him duly authorized. This section shall not apply to any agreement made prior to May seventeenth, eighteen hundred and eighty-eight."

The basic issue is whether under § 5 an oral agreement, such as is here alleged, not to make a will is binding. No decision has been found on this precise point. Plaintiff contends for a strictly literal reading of the section which

would limit its application solely to agreements to make a will. This was the view taken by the majority of the court in *Cleaves* v. *Kenney*, 63 F. 2d 682, on which plain-
[fol. 9] tiff principally relies. In that case it was held that an oral agreement to destroy a will and codicil and die intestate did not fall within either of the statutory provisions cited above.

The opposing and seemingly sounder interpretation is that expressed by Judge Morton in his dissent in the *Cleaves* case, where he said, "I cannot doubt that what the Legislature had in mind by the expression, 'No agreement to make a will,' etc., was really, 'No agreement about making a will,' etc. If oral agreements affecting testamentary disposition of property escape the statute, if thrown into the negative form, a wide door is opened to the sort of fraud which the statute was intended to prevent." The dangers at which the statute is aimed are equally present whether the agreement is to bring about the desired disposition of property by making a will, by destroying or not destroying a will already made, or by refraining from making a will. This interpretation has been made as to similar statutes in other states. *Griffin* v. *Driver*, 202 Ga. 111; *Downey* v. *Guilfoile*, 96 Conn. 383, 387. And the only recent interpretation of § 5 by the Massachusetts courts, in *West* v. *Day Trust Co.*, 328 Mass. 381, 384, where the court held that an oral promise not to revoke a will fell within the terms of the statute, indicates that the Massachusetts court would not adopt the strictly literal construction of the majority in the *Cleaves* case.

In *Gould* v. *Mansfield*, 103 Mass. 408, it was held that an oral agreement to make a will disposing of real and personal property was a contract for the sale of lands within the meaning of §1 Fourth and was indivisible as to real and personal property. For the reasons set forth above as to §5, it would seem that the contract alleged here would equally fall within the provisions of §1 Fourth.

Defendant's motion to dismiss is allowed.

[fol. 10]

IN UNITED STATES DISTRICT COURT

JUDGMENT—December 19, 1960

FORD, D.J. After hearing on Defendant's Motion to Dismiss, in the above entitled action, and motion having been allowed, and in accordance with the Memorandum of Decision, dated December 16, 1960, it is hereby Ordered Judgment for the defendant dismissing the Complaint.

By the Court: Austin W. Jones, Jr., Deputy Clerk.

December 19, 1960

FORD, United States District Judge.

Judgment entered December 19, 1960, John A. Canavan, Clerk, by Grace V. Flood, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO VACATE JUDGMENT ON DEFENDANT'S MOTION TO DISMISS AND DENIAL THEREOF—Filed December 20, 1960

Now comes the plaintiff in the above entitled action, and moves that this Court vacate its Order allowing defendant's Motion to Dismiss and Judgment thereon, in order to permit the plaintiff to file a Motion to Amend her Complaint by adding a second cause of action for monies paid and services rendered for and on behalf of the decedent, in accordance with plaintiff's Motion herewith filed.

Lenore Foman, By Her Attorneys, Guterman, Horvitz & Rubin, Henry N. Silk.

[fol. 11] 1-23-61, FORD, D.J., Hearing—Motion Denied.

By the Court, Austin W. Jones, Jr., Dep. Clk.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO AMEND HER COMPLAINT AND DENIAL THEREOF—Filed December 20, 1960

Now comes the plaintiff in the above entitled action, and moves to amend her Complaint by adding a Second Cause of Action, as hereto annexed.

Lenore Foman, By Her Attorneys, Guterman, Horvitz & Rubin, Henry N. Silk.

COMPLAINT

Second Cause of Action

1. Plaintiff is a citizen and resident of the Town of Riverdale, in the State of New York. The defendant, Elvira A. Davis, is a resident of Melrose, County of Middlesex, and Commonwealth of Massachusetts, and is the Executrix under the Will of Wilbur W. Davis, late of said Melrose, having been duly appointed and qualified on October 7th, 1959, in the Probate Court for the County of Middlesex, Commonwealth aforesaid. Docket No. 356382. The matter in controversy exceeds the sum of Ten Thousand, ($10,000.00) Dollars, exclusive of interest and costs.

2. The defendant owes the plaintiff Twelve Thousand Five Hundred, ($12,500.00) Dollars for monies paid by the [fol. 12] plaintiff for and on behalf of the defendant, and for services rendered for and on behalf of the defendant for the period May 16th, 1947 to and including February 1st, 1953.

3. Wherefore, plaintiff demands judgment in the amount of Twelve Thousand Five Hundred, ($12,500) Dollars, together with interest and costs.

4. Plaintiff claims jury trial.

Lenore Foman, By Her Attorneys, Henry N. Silk.

1-23-61, FORD, D.J., Hearing—Motion denied.

By the Court, Austin W. Jones, Jr., Dep. Clk.

[fol. 12a]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS
—Filed January 17, 1961

Notice is hereby given that Lenore Foman, plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit from the final Judgment entered in this action on December 19th, 1960.

Guterman, Horvitz & Rubin, Henry N. Silk, Attorneys for the Appellant, Lenore Foman, 50 Congress Street, Boston, Massachusetts.

[fol. 12b]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS
—Filed January 26, 1961

Notice is hereby given that Lenore Foman, plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit from the orders entered in this action on January 23, 1961 denying (a) Plaintiff's Motion to Vacate Judgment on Defendant's Motion to Dismiss and (b) Plaintiff's Motion to Amend Her Complaint.

Guterman, Horvitz & Rubin, Henry N. Silk, Attorneys for the Appellant, Lenore Foman, 50 Congress Street, Boston, Massachusetts.

[fol. 13]

PROCEEDINGS IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

ORDER CONSOLIDATING CASES—February 24, 1961

On February 24, 1961, an order was entered upon motion of appellant granting her leave to consolidate the two appeals and docket them as a single case in this Court.

ARGUMENT AND SUBMISSION—May 4, 1961

Thereafter, on May 4, 1961, this cause came on to be heard and was fully heard by the Court, Honorable Peter Woodbury, Chief Judge, and Honorable John P. Hartigan and Honorable Bailey Aldrich, Circuit Judges, sitting.

[fol. 15]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5808

LENORE FOMAN, Plaintiff-Appellant,

v.

ELVIRA A. DAVIS, Executrix, Defendant-Appellee.

Appeal From the United States District Court for the District of Massachusetts.

Before Woodbury, Chief Judge, and Hartigan and Aldrich, Circuit Judges.

Henry N. Silk, with whom Guterman, Horvitz & Rubin was on brief, for appellant.

Roland E. Shaine, with whom Brown, Rudnick, Freed & Gesmer was on brief, for appellee.

HARRIGAN, Circuit Judge. Plaintiff in the instant case appeals from a judgment of the United States District Court for the District of Massachusetts entered following the allowance of defendant's motion to dismiss and from orders of the district court denying plaintiff's motion to vacate judgment and to amend her complaint.

The action involves an oral agreement between the plaintiff, Lenore Fonnin, and her father, Wilbur W. Davis, the decedent, by which decedent agreed to refrain from making a will and to die intestate and plaintiff agreed to assume and pay all expenses for the care and maintenance of decedent's wife, who was also the plaintiff's mother. Under [fol. 16] the alleged agreement, plaintiff would receive a child's share according to the laws of intestacy of the Commonwealth of Massachusetts. Plaintiff alleged the making of this oral agreement and her subsequent fulfillment of her obligations under it. Plaintiff alleged that her father, in breach of the agreement, executed a Last Will and Testament, duly allowed in the Probate Court for the County of Middlesex, by which he devised and bequeathed virtually all of his estate to defendant, who was his second wife, and bequeathed nothing to the plaintiff. This suit was brought against Elvira A. Davis, decedent's widow and executrix.

Defendant filed an answer which denied the making of such agreement and set up various defenses, among them, the bar of the statute of frauds. Defendant on the same day also filed a motion to dismiss the action.

The district judge granted the motion to dismiss on the ground that the action on the oral contract was barred by the Massachusetts statute of frauds and judgment was entered on December 19, 1960.

On December 30, 1960 plaintiff filed a motion to vacate the order granting defendant's motion to dismiss and the judgment thereon in order to permit plaintiff to file a motion to amend her complaint by adding a second cause of action for monies paid and services rendered for and on behalf of the decedent. Plaintiff at the same time filed a motion to so amend and attached the proposed amendment.

On January 17, 1961 plaintiff filed a notice of appeal from the judgment entered December 19, 1960. Subsequently on January 23, 1961 the district court held a hearing on plaintiff's motions of December 20, 1960 and denied each motion. A notice of appeal from the denial of these motions was filed by plaintiff on January 26, 1961.

Preliminarily there is a question of what is properly before us on appeal. "A motion under F.R.Civ.P. 59(e) to [fol. 17] alter or amend the judgment terminates the running of the time for taking an appeal. See Rule 73. However, a motion under Rule 60(b) does not affect the finality of a judgment or suspend its operation. The plaintiff's motion seeking the vacating of the dismissal order and judgment does not designate the rule under which it is brought. If the motion to vacate the dismissal order and judgment thereon is construed as one under Rule 59(e), then the appeal taken on January 17, 1961 from the judgment entered on December 19, 1960 was premature, since the running of the time for appeal is terminated by a timely motion under Rule 59(e) and the motion had not yet been disposed of by the district court. See Rule 73; 7 Moore, Federal Practice ¶73.09 [6] (2d ed. 1955). On the other hand, if said motion is construed as an effective Rule 60(b) motion, then the finality of the judgment would not have been suspended and the January 17, 1961 appeal would be properly before us.

Although the cases do authorize the vacating of a judgment under both rules in the proper circumstances, *Klapprott* v. *United States*, 335 U. S. 601, 615 (1948), judgment modified 336 U. S. 942 (1949); *Patapoff* v. *Vollsted's Inc.*, 267 F.2d 863 (9 Cir. 1959); *Kelly* v. *Delaware River Joint Commission*, 187 F.2d 93 (3 Cir.), cert. denied, 342 U. S. 812 (1951); 6 Moore, Federal Practice ¶59.12 [1] (2d ed. 1953), we believe that the full context of the rules dictates that resort should be made to the procedure under Rule 59 if time for applying for such motions has not expired. Cf. *Chicago & N. W. Ry. Co.* v. *Davenport*, 95 F.Supp. 469 (S.D.Iowa 1951) which is criticized in 7 Moore, Federal Practice ¶60.27 [2], p. 306 n.23 (2d ed. 1955). We are unable to find any case which construed a motion to vacate a judgment made within 10 days of the judgment as a Rule

60(b) motion so that an appeal taken before a disposition of the motion would be timely. Plaintiff's second notice [fol. 18] of appeal could have specified the judgment of December 19, 1960. Lacking such reference, we believe that the appeal insofar as the judgment is concerned must be dismissed. See *Aberlin* v. *Zisman*, 244 F.2d 620 (1 Cir.), cert. denied 355 U. S. 857 (1957).

In regard to the contention that the district court abused its discretion in not allowing plaintiff's motions to vacate the judgment and amend her complaint, there is nothing presented by the record to show the circumstances which were before the district court for its consideration in ruling on the motions. We, therefore, cannot say that the district court abused its discretion.

Judgment will be entered dismissing the appeal insofar as it is taken from the district court's judgment entered December 19, 1960; and affirming the orders of the district court entered January 26, 1961.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

JUDGMENT—June 26, 1961

This cause came on to be heard on consolidated appeals from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The orders of the District Court entered January 26, 1961, are affirmed; and the appeal from the judgment of the District Court entered December 19, 1960, is dismissed.

By the Court: Roger A. Stinchfield, Clerk.

Approved: Peter Woodbury, Ch. J.

[fol. 20a]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed July 10, 1961

To the United States Court of Appeals for the First Circuit and the Honorable Judges thereof:

Appellant in the above-entitled cause presents this her petition for a rehearing of the above-entitled cause, and in support thereof respectfully shows:

I.

The opinion of the Court, dated June 26, 1961, orders that judgment be entered dismissing the appeal insofar as it is taken from the District Court's judgment entered on December 19, 1960 (p. 4 [printed herein on page 15, side folio 18]), on the ground that the appellant's notice of appeal filed on January 17, 1961, was premature (p. 3 [printed herein on page 14, side folio 17]) and that appellant's subsequent notice of appeal, filed on January 26, 1961, was ineffective to raise on appeal said judgment (p. 4 [printed herein on page 15, side folio 18]).

II.

The Court's holding that appellant's second notice of appeal (filed on January 26, 1961) was ineffective in appealing the original judgment of the District Court was [fol. 20b] based on the ground that this notice referred only to the denial of appellant's motions (to vacate the order dismissing the complaint and to permit amendment of her complaint), but did not mention the judgment of December 19, 1960, although the "notice of appeal could have specified" (pp. 3-4 [printed herein on pages 14-15, side folios 17-18]) this judgment. The Court stated: "Lacking such reference, we believe that the appeal insofar as the judgment is concerned must be dismissed" (p. 4 [printed herein on page 15, side folio 18]).

III.

In holding this second notice of appeal ineffective in appealing the original judgment the Court cited as authority a dictum in a recent case in this Circuit.[1] The Court has overlooked, however, a line of cases directly on point on the issue of the effect of a notice of appeal such as that filed by appellant on January 26, 1961.[2] These cases, rep-
[fol. 20c] resenting the opinion of the United States Supreme Court as well as almost every federal judicial circuit, including the First Circuit, have held (or noted with approval the holding) that a judgment of a District Court is properly on appeal before a Court of Appeals although the notice of appeal does not specify the judgment being appealed from and refers, instead, to the District Court's order denying a motion under Rule 59 (or a motion having a similar effect on the finality and appealability of the judg-

[1] In *Aberlin* v. *Zisman*, 244 F. 2d 260 (1st Cir. 1957), cert. den. 355 U.S. 857 (1957), the notice of appeal analogous to the one in issue in the instant case was from an order denying a motion for a new trial. Although the Court nominally addressed itself only to this order and not to the judgment, it stated that on the appeal "appellant is free to assert any alleged errors which entered into and infected the judgment . . ." *Id.* 261. Thus, since the scope of review on review of the order denying the motion was as broad as the scope of review on review of the original judgment, the issue presented in the instant case—whether a notice of appeal from the order denying a motion properly appeals from the original judgment—was neither before the Court nor was it considered by the parties. The *Aberlin* case is therefore of little value as precedent in the instant appeal.

[2] *State Farm Mutual Automobile Insurance Co.* v. *Palmer*, 350 U.S. 944 (1956), reversing 225 F. 2d 876 (9th Cir. 1956); *Conway* v. *Pennsylvania Greyhound Lines, Inc.*, 243 F. 2d 39, 40, n. 2 (D.C. Cir. 1957); *Creedon* v. *Loring*, 249 F. 2d 714 (1st Cir. 1957), citing *United States* v. *Best*, 212 F. 2d 743, 744-745, n. (1st Cir. 1954); *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 65, 68 (3d Cir. 1958); *United States* v. *Stromberg*, 227 F. 2d 903, 904 (5th Cir. 1955); *Holz* v. *Smullon*, 277 F. 2d 58, 61 (7th Cir. 1960); *Nolan* v. *Bailey*, 254 F. 2d 638, 639 (7th Cir. 1958); *Railway Express Agency, Inc.* v. *Epperson*, 240 F. 2d 189, 192 (8th Cir. 1957); and *Cheney* v. *Moler*, 285 F. 2d 116, 117-118 (10th Cir. 1960). And see *Val Marine Corp.* v. *Costas*, 256 F. 2d 911, 916 (2d Cir. 1958); *Gunther* v. *E. I. DuPont DeNemours & Co.*, 255 F. 2d 710, 717 (4th Cir. 1958); and *Trivette* v. *N.Y.L.I.C.*, 270 F. 2d 198 (6th Cir. 1959).

ment). In overlooking this line of cases the Court has rendered a decision in conflict with the overwhelming weight of authority and one which, in effect, overrules two cases in this very circuit without considering or even mentioning them in its opinion.

IV.

By its opinion in this cause, it is respectfully submitted, the Court has disregarded the principles underlying the system of federal procedure—principles of liberality, against technicality and in favor of deciding cases on the merits.[3]

[fol. 20d] For the reasons stated above, appellant requests that a rehearing be granted and that at such rehearing the judgment of this Court be reversed and the cause

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[3] "The filing of a simple notice of appeal was intended to take the place of more complicated procedures to obtain review, and the notice should not be used as a technical trap for the unwary draftsman." *Donovan* v. *Esso Shipping Co., supra*, n. 2. See 6 Moore, Federal Practice ¶ 59.12 (2d ed. 1955); 5 *id.* ¶ 52.11[3]; 2 *id.* 55, stating that "Decisions are to be on the merits and not on procedural niceties." "The spirit of the Rules is that technical requirements are abolished and judgments be founded on facts and not on formalistic defects." The purpose of modern procedure is "to secure a disposition of litigation on the merits rather than by collateral methods"; a court should "avoid a strict technical interpretation which might work a hardship on the litigants." The author also states that one of the major contributions of the Rules is "a general emphasis against technical error and that harmless error be treated as harmless error." 1 *id.* 5041. See also Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use*, 15 F.R.D. 155: "Procedure, to be sure, is not an end in itself. It is merely the means by which justice is achieved." The adoption of the Rules, says the author, "brought about a new era in the administration of justice,—an era characterized by a desire to reduce technicalities to a minimum and to decide all cases on their merits as expeditiously as possible." And see Clark, *Fundamental Changes Effected by the New Federal Rules*, 15 Tenn. L. Rev. 551 (1939); Moscowitz, *Trends in Federal Law and Procedure*, 21 N.Y.U.L.Q. 1, 27 (1946); and Brown, *Eight Months Under the New Rules*, 25 A.B.A.J. 602, 604 (1939).

Note how lightly Magruder, C.J. disposed of the issue which is before this Court in his opinion in *United States* v. *Best, supra*, n. 2; and in *Creedon* v. *Loring, supra*, n. 2, he denied the appellee's motion to dismiss the appeal, saying: "It is founded on pure technicality."

be considered as properly before this Court on appeal on the merits (treating the notice of appeal filed on January 26, 1961, as properly appealing the judgment of the District Court entered on December 19, 1960, which became final and appealable on January 23, 1961).

Respectfully submitted,

Henry N. Silk, Guterman, Horvitz & Rubin, Attorneys for the Appellant.

Milton Bordwin, Of Counsel.

July 7, 1961.

[fol. 20e] Certificate

I, Henry N. Silk, attorney for appellant herein, hereby certify, in accordance with the requirements of Rule 31 of this Court, that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

Henry N. Silk

[fol. 20f] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 21]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5808

LENORE FOMAN, Plaintiff-Appellant,

v.

ELVIRA A. DAVIS, Executrix, Defendant-Appellee.

Appeal From the United States District Court for the District of Massachusetts.

Before Woodbury, Chief Judge, and Hartigan and Aldrich, Circuit Judges.

Henry N. Silk, with whom Guterman, Horvitz & Rubin was on brief, for appellant.

Roland E. Shaine, with whom Brown, Rudnick, Freed & Gesmer was on brief, for appellee.

OPINION OF THE COURT ON PETITION FOR REHEARING —August 17, 1961

HARTIGAN, Circuit Judge. Plaintiff's petition for rehearing seeks to read into our opinion much broader principles than are justified or were intended. In holding that the second notice of appeal did not bring before us the propriety of the judgment of dismissal we did not intend to overrule or qualify our earlier cases, of which *Creedon* v. *Loring*, 249 F.2d 714 (1 Cir. 1957), cited by plaintiff, is an example. In *Creedon* v. *Loring*, following the entry of judgment for the defendants upon verdicts of the jury, plaintiffs filed a motion for a new trial. After that motion had been denied, plaintiffs appealed "from the order [fol. 22] . . . denying plaintiff's motion for a new trial." The defendants moved to dismiss the appeal as not having been taken from the final judgment. We denied this motion as "founded on a pure technicality." We pointed out, however, that plaintiffs were limited in their appeal to those alleged errors "on which the motion for the new trial was based; it is not open to appellant to urge other alleged errors at the trial which might have been presented on an appeal from the original judgment itself." Id. at 717.

Similarly, other circuits have recognized that an appeal from the denial of a new trial may carry back to the judgment in which the errors sought to be rectified by the motion occurred. See, e.g., *Cheney* v. *Moler*, 285 F.2d 116, 118 (10 Cir. 1960); *Holz* v. *Smullan*, 277 F.2d 58 (7 Cir. 1960). In *Donovan* v. *Esso Shipping Company*, 259 F.2d 65 (3 Cir. 1958), cert. denied, 359 U.S. 907 (1959), the court said: "A defective notice of appeal should not warrant dismissal for want of jurisdiction where the intention to appeal from a specific judgment may be reasonably inferred from the text of the notice and where the defect has not materially misled the appellee. . . . For example,

an appeal from the denial of a new trial may under exceptional circumstances be treated as an inept attempt to appeal from the judgment which preceded that denial." However, the court went on to say: "While mere technical omissions in the notice of appeal should not deprive appellant of his right of review, where the appeal is taken specifically only from one part of the judgment the appellate court has no jurisdiction to review the portion not appealed from." Id. at 68. The notice of appeal in that case specifically sought review of the dismissal of all causes of action "other than that cause of complaint on maintenance and cure." The court held it was without jurisdiction to consider the maintenance and cure question. All of these cases, however, indicate that the determinative ele- [fol. 23] ment is one of intent, i.e., whether the intent to appeal from the judgment may be reasonably inferred from the notice of appeal.

In the case at bar, following the original judgment of dismissal, plaintiff did not move for review or reconsideration, comparable to a motion for a new trial, but moved for leave to amend the complaint by adding a self-styled "Second Cause of Action," by which she sought substantially less damages, upon a different theory, predicated on the assumption that the dismissal of the first cause of action was in fact correct. This was, by hypothesis, an independent matter. Any error involved in the denial of this motion for leave to amend could relate back in no way to errors which entered into and infected the original judgment. Also, militating against plaintiff's position that the second notice of appeal was intended to be an appeal from the original judgment of dismissal is the factor that plaintiff plainly thought she appealed from that judgment by her first notice of appeal. Now that that notice of appeal has been held premature, plaintiff contends that the second notice of appeal is sufficient. We believe, however, that under the principles of the above-cited cases, plaintiff's second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal.

If plaintiff's second appeal was in her mind intended to encompass the old cause of action rather than, or in ad-

dition to, the proposed new one, it was deficient not technically, but in substance.

The petition for rehearing is denied.

[fol. 24] On the same day, August 17, 1961, the following order of Court was entered:

ORDER OF COURT DENYING PETITION FOR REHEARING —August 17, 1961

It is ordered that the petition for rehearing filed by appellant on July 10, 1961, be, and the same hereby is, denied.

By the Court: Roger A. Stinchfield, Clerk.

[fol. 25] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 26]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States.

No. 41 OCTOBER TERM, 1961

LENORE FOMAN,
Petitioner,

v.

ELVIRA A. DAVIS, EXECUTRIX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MILTON BORDWIN,
Attorney for Petitioner.

50 Congress Street,
Boston, Massachusetts,
November 10, 1961.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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LENORE FOMAN,
Petitioner,

v.

ELVIRA A. DAVIS, EXECUTRIX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Lenore Foman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on June 26, 1961 (rehearing denied, August 17, 1961).

Opinions Below.

The memorandum opinion of the district court is unreported and is printed in the Record Appendix at p. 7. The first opinion of the Court of Appeals is reported in 292 F. 2d 85, and is printed in Appendix B hereto, *infra*, p. 30; the opinion denying rehearing is unreported to the date of the printing of this Petition, but is printed in Appendix B hereto, *infra*, p. 33.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 26, 1961 (R.A. 15).[1] A timely petition for rehearing was filed on July 7, 1961 (R.A. 19), and denied on August 17, 1961 (R.A. 21). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.[2]

1. Is a notice of appeal which is filed during the pendency of a Rule 59(e) motion to vacate judgment a nullity, or should it be given effect once the motion is denied?

2. When a motion to vacate judgment does not designate under which of two possible rules it is made—59(e) or 60(b)—is it properly held to have been made under that rule which results in denying plaintiff a disposition on the merits rather than the one which would permit such a disposition?

3. Is a notice of appeal which refers to the denial of a post-judgment, non-appealable order sufficient, under Rule 73(b), to raise the original judgment on appeal?

4. Where a complaint is drawn in accordance with an unreversed decision of the United States Court of Appeals for the First Circuit, does a district judge in that Circuit, after refusing to adhere to the decision and dismissing the complaint for failure to state a claim, abuse his discretion by denying a motion to amend the complaint?

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[1] References to "R.A." refer to the Record Appendix to Brief for Appellant filed in the court below by petitioner, copies of which are filed herewith. References to "App." refer to the appendices to this Petition.

[2] Unless otherwise noted, all references to "rule" or "rules" refer to the Federal Rules of Civil Procedure, 28 U.S.C.

Statutes and Rules Involved.

The statutory provisions involved are 28 U.S.C. §§ 777 (repealed), 1291, 2111, and the following numbered rules of the Federal Rules of Civil Procedure, 28 U.S.C.: Rules 1; 8(f); 15(a); 15(c); 54(c); 59(e); 60(b); 61; and 73(b). These statutes and rules are printed in Appendix A hereto.

Statement of the Case.

On June 14, 1960, petitioner, a citizen of the State of New York, filed her complaint in this action against the respondent, a citizen of the Commonwealth of Massachusetts, as executrix under the will of Wilbur W. Davis. Petitioner alleged in her complaint that the matter in controversy exceeded the sum of ten thousand dollars, exclusive of interest and costs, jurisdiction in the district court being based upon diversity of citizenship under 28 U.S.C. § 41(1).

In her complaint (R.A. 2) petitioner alleged in a single count an oral agreement with her father, the decedent, Wilbur W. Davis, whereby the petitioner agreed to care for her mother, decedent's first wife, and to pay all expenses for her care and maintenance for as long as she lived. The complaint further alleged that the decedent, in turn, agreed to make and leave no will, to the end that the petitioner, as his only child, would take that portion of his estate to which she would be entitled under the intestacy laws of Massachusetts.

In setting forth her cause of action in a single count based upon the oral agreement, petitioner relied upon *Cleaves* v. *Kenney*, 63 F. 2d 682 (1st Cir. 1933) (R.A. 7-8; Brief for Appellee, pp. 6, ff.; Brief for Appellant, pp. 3, ff.), which held that an oral agreement to destroy a will

and codicil and die intestate did not fall under the Massachusetts statute of frauds.

Petitioner further alleged that she fully performed her part of the agreement; that subsequent to the death of decedent's first wife he married the respondent; and that thereafter he made a will which, except for a $5,000 legacy to a brother, devised and bequeathed his entire estate to the respondent. Petitioner, by this action, sought to recover that portion of the decedent's estate which she would have received if the decedent had neither made nor left a will as allegedly agreed.

On August 11, 1960, respondent filed her answer and motion to dismiss the complaint on the ground that it failed to state a claim for which relief could be granted. By memorandum of decision dated December 16, 1960, the district judge allowed the motion (R.A. 7-9), declining to follow the holding in *Cleaves* v. *Kenney, supra;* and judgment dismissing the complaint was entered December 19, 1961 (R.A. 10).

On December 20, 1960, petitioner filed motions to vacate the judgment of dismissal and to amend her complaint (R.A. 10, 11). While these motions were pending before the district judge, the petitioner, apprehensive lest the time allowed for an appeal should expire, filed a notice of appeal on January 17, 1961, from the judgment of dismissal entered on December 19, 1960. On January 23, 1961, the district judge denied petitioner's motions to vacate judgment and for leave to amend and on January 26, 1961, petitioner filed a second notice of appeal from the order denying these motions. (The two notices of appeal are printed in Appendix C hereto, *infra,* p. 36.)

Upon motion by petitioner, assented to by respondent, the Court of Appeals on February 24, 1961, ordered the two appeals consolidated. Subsequently, in compliance with Rule 24(2) of the Rules of the United States Court

of Appeals for the First Circuit, petitioner furnished to the Court and the respondent "a statement of points" upon which she intended to rely on appeal. (This Statement is set out as Appendix D hereto, *infra*, p. 37.)

In due course petitioner and respondent filed briefs on appeal with the Court of Appeals, in which were argued the issues whether the Massachusetts statute of frauds constituted a bar to the action and whether the district judge had committed reversible error in denying petioner's motions to vacate the judgment of dismissal and to amend her complaint. In addition, respondent argued that, after the first notice of appeal was filed, the district court was deprived of jurisdiction over the case. *Neither* party, however, argued the issue of the jurisdiction of the Court of Appeals, which was first raised by that Court, *sua sponte*, at the oral argument on appeal.

By its opinion dated June 26, 1961 (App. B, p. 30), the Court of Appeals ordered judgment dismissing the appeal from the judgment of the district court and affirming the district court's order of January 26, 1961, which denied petitioner's motions to vacate judgment and to amend her complaint. The Court held:

First—Although the motion to vacate judgment could have been filed under either Rule 59(e) or Rule 60(b), in the absence of a designation by the movant "the full context of the rules dictates that resort should be made to the procedure under Rule 59 if time for applying for such motions has not expired."

Second—Since a motion under Rule 59 terminates the running of time for taking an appeal (Rule 73(a)), the notice of appeal filed on January 17, 1960, during the pendency of the motion to vacate, was premature and, presumably, of no effect.

Third—The second notice of appeal, referring only to the order denying the motions to vacate and to amend and

not to the original judgment, must therefore, with respect to such judgment, be dismissed.

On July 7, 1961, petitioner filed a timely petition for rehearing with the Court of Appeals in which she argued that the second notice of appeal should be treated as appealing from the judgment rather than the unappealable order denying the post-judgment motions. Furthermore, petitioner argued, the ruling of the Court of Appeals was in violation of the basic liberal principles of modern, enlightened practice and procedure in the federal courts. The Court denied rehearing (App. B, p. 35), saying that "the intent to appeal from the judgment" could not reasonably be inferred from the notice of appeal. "* * * [P]laintiff's second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal." Petitioner now brings this petition for a writ of certiorari.

Reasons for Granting the Writ.

The most important reason for granting the writ is that the decision of the Court of Appeals, in its various aspects and viewed as a whole, is contrary to the letter and spirit of the Federal Rules of Civil Procedure, to the Judicial Code, and, in general, to the basic principles of modern federal practice and procedure articulated by this Court as well as the Courts of Appeals of the various circuits, with which the decision appealed from is in conflict. The area of dispute involves amendment of pleadings and questions of appellate jurisdiction—subjects of importance to the practitioner in the federal courts and to this Court in its capacity as overseer of the administration of justice in the federal court system.

Summary of Argument.

This portion of the Petition treats with three aspects of the decision of the Court of Appeals: Part I considers the holding that petitioner's undesignated motion to vacate judgment to permit her to amend her complaint should be construed as motion under Rule 59(e) rather than Rule 60(b). Part II deals with the holding that petitioner's second notice of appeal, referring only to the denial of her motion to vacate, is insufficient to bring the judgment of dismissal before the Court of Appeals. Part III is addressed to the denial of petitioner's motion to amend her complaint. We submit that the decision of the Court of Appeals on these three issues indicates the need of review by this Court.

Argument.

I.

The decision of the Court of Appeals, whether viewed as a whole or, as is necessary for the purposes of this Petition, as a number of separate holdings, is in conflict with the most elemental principle of modern federal procedure—a principle recently articulated by this Court:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957).

Recognizing that petitioner's motion to vacate the judgment of dismissal could have been filed under either Rule 59(e) or Rule 60(b) (App. B, p. 32), and realizing, as it

must, that petitioner was not bound to cite the particular rule relied upon,[3] and noting that, if construed under Rule 59, both of petitioner's notices of appeal would be held ineffectual (but, if construed under Rule 60, effectual), yet the Court of Appeals decided that "the full context of the rules" dictated that the motion should be held to have been made under Rule 59.

The full context of the rules, we submit, in their most basic and essential principles, requires that, in construing pleadings, courts shall disregard harmless error (Rule 61; 28 U.S.C. § 2111), and that pleadings be construed "to secure the just, speedy, and inexpensive determination of every action" (Rule 1) and so "as to do substantial justice" (Rule 8(f)). The decision of the Court of Appeals, resulting as it does in a dismissal of the action purely on matters of pleading and without reaching the substance of petitioner's grievance, disregards, we submit, the purpose of pleading as articulated by this Court—"to facilitate a proper decision on the merits." *Conley* v. *Gibson*, *supra*.

In order to reach the merits, the Court of Appeals should have characterized petitioner's undesignated motion to vacate judgment under whatever applicable rule would have yielded that desirable result, be it Rule 59, Rule 60, or some other rule. But this larger and more significant principle is not resorted to by the Court of Appeals; rather, by framing the issue narrowly it rests its holding, in part, on its inability "to find any case which construed a motion to vacate a judgment made within 10 days of the judgment as a Rule 60(b) motion so that an appeal taken

[3] Rule 7(b), which deals with the form of motions, does not require reference to a particular rule under which a motion is made. See 7 Moore, Federal Practice, ¶ 60.18 [8], p. 215 (2d ed. 1955), text at nn. 5-6; *Dunn* v. *J. P. Stevens & Co., Inc.*, 192 F. 2d 854, 855 (2d Cir. 1951).

before a disposition of the motion would be timely" (App. B, p. 32). But other Courts of Appeals, in harmony with the principle expressed by this Court in *Conley, supra*, and with awareness of the alternative results of characterizing a pleading one way or another, have uniformly ruled in favor of a characterization which permits a decision on the merits.

Thus Judge Frank in the Second Circuit held that a motion for a new trial[4] should have been treated as a Rule 60(b) motion, thus rendering the plaintiff's appeal timely.[5] Judge Clark of the same Circuit has said that defendant's motions to serve supplemental pleadings and to reargue plaintiff's motion for summary judgment earlier granted might, "in the interest of justice," be treated as Rule 60(b) motions if any of the grounds in that rule were met. *United States* v. *Wissahickon Tool Works, Inc.*, 200 F. 2d 936, 938 (2d Cir. 1952). Other courts have treated variously designated pleadings as if they were motions under Rule 60(b). Thus the Third Circuit has deemed a letter to the district court to be a motion under 60(b), *United States* v. *Backofen*, 176 F. 2d 263 (3d Cir. 1949); the Sixth Circuit has treated an independent action as a 60(b) motion, *Sebastiano* v. *United States*, 103 F. Supp. 278, aff'd, 195 F. 2d 184 (6th Cir. 1952); and a district court in the Ninth Circuit has treated a petition for a writ of coram nobis as a 60(b) motion. *In re Estate of Cremidas*, 14 F.R.D. 15 (D. Alaska, 1953).

And when it serves the end of deciding cases on their merits, courts will *reject* the Rule 60 characterization. In *Southern States Equipment Corp.* v. *USCO Power*

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[4] Rule 59 is captioned: "New Trials • • •."

[5] *Tarkington* v. *United States Lines Co.*, 222 F. 2d 358 (2d Cir. 1955). The motion for a new trial was filed 21 days after judgment; the notice of appeal was filed 64 days after judgment, but within the 30-day appeal period after order denying the motion.

Equipment Corp., 209 F. 2d 111 (5th Cir. 1953), appellant filed a motion purporting to be under Rule 60(a), requesting the court to correct a "clerical error in the judgment." This error was corrected and the judgment ordered re-entered as corrected. Within 30 days of the second entry of judgment, but more than 30 days after the first, appellees filed notice of appeal from certain portions of the corrected judgment adverse to them. Appellant contended that, since a Rule 60 motion does not toll the running of time for appealing, appellees' notice, coming more than 30 days after original entry of the judgment appealed from, was untimely and the appeal should be dismissed. The court's disposition of the issue thus presented indicates, we submit, the proper approach in the instant case:

> "Without dealing with the various ramifications and procedural complexities of the problem at length and considering it only in light of requirement of Rule 8(f), F.R.C.P., that 'all pleadings shall be so construed as to do substantial justice', we hold that appellant's motion filed June 19, 1952, while purporting to be a motion under Rule 60(a), will for present purposes be treated as a motion to alter or amend the judgment under Rule 59(e), and that appellant's motion to dismiss the cross-appeal is denied." 209 F. 2d at 116-117.[6]

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[6] See also *Hadden* v. *Rumsey Products, Inc.*, 196 F. 2d 92 (2d Cir. 1952), where the court had before it certain petitions attacking a final judgment (it apparently viewing these petitions as permitted under Rule 60(b)). These petitions, the court said, "may be treated as an independent action to obtain equitable relief" from the judgment; and this, notwithstanding that "Rule 3 states that an action is commenced by filing a complaint" and that Rule 4 contemplates that a summons shall be issued and served. The court noted that, despite technical requirements not

This basic principle in favor of liberality and against hypertechnicality, this recognition and effectuation of the primary purpose of pleadings as articulated by this Court in *Conley, supra*, is evident in cases involving matters other than the two particular rules involved in the instant case. Thus a petition for rehearing has been held equivalent to a motion for a new trial. *Fraser* v. *Doing*, 130 F. 2d 617 (D.C. Cir. 1942); *The Astorian*, 57 F. 2d 85, 87 (9th Cir. 1932). An acknowledgment of service of notice of appeal by the appellee, when filed, has been held an acceptable substitute for a regular notice of appeal which was not timely filed with the court. *Crump* v. *Hill*, 104 F. 2d 36 (5th Cir. 1939). In *Jordan* v. *United States District Court*, 233 F. 2d 362, 365 (D.C. Cir. 1956), a petition for a writ of mandamus filed with the appellate court was accepted as a sufficient notice of appeal. And an application made in the appellate court for leave to appeal in forma pauperis has been held "an unequivocal notification of intention to appeal" and sufficient to give the court jurisdiction. *Blunt* v. *United States*, 244 F. 2d 355, 359 (D.C. Cir. 1957); *Burdix* v. *United States*, 231 F. 2d 893, 894 (9th Cir. 1956); *Roth* v. *Bird*, 239 F. 2d 257 (5th Cir. 1956). And, finally, a motion for summary judgment (Rule 56(b)) was treated as a motion to dismiss the complaint for failure to state a claim upon which relief can be granted (Rule 12(c), mentioned by the court). *Dunn* v. *J. P. Stevens & Co.*, 192 F. 2d 854 (2d Cir. 1951).

One further area merits this Court's attention, and that is the apparent inconsistency of the Court of Appeals' reliance on the pleader's intention in one instance of characterizing a pleading, and the complete absence of mention of intention in another. In holding petitioner's

having been met, "it would be quite out of harmony with the spirit of Rule 1 to hold the appellees bound by the labels placed on the papers submitted to the district court." 196 F. 2d at 95.

second notice of appeal ineffectual, the Court relied chiefly on its determination that petitioner did not *intend* to appeal from the judgment by that notice (App. B, p. 35). Yet, in holding that the motion to vacate was a Rule 59 and not a Rule 60 motion, intention of the pleader is not even adverted to. Without expanding on this point unduly, it would seem clear that petitioner's intention, in light of her presumed intention that her two notices of appeal shall be effectual, was that her motion to vacate was filed under that rule which yielded the desired effect, namely Rule 60(b). An analysis of petitioner's intention along the lines pursued by the Court of Appeals with respect to the second notice of appeal, when applied to the undesignated motion, yields a result opposite to the conclusion of the Court. If intention is properly a criterion in characterizing pleadings, then, we submit, it should be applied even-handedly and consistently, rather than only in those aspects of the case where its application is prejudicial to petitioner. We do not argue in favor of resort to a pleader's intention—indeed, we argue that all such nebulous desiderata give way to the basic and essential principles of federal procedure. See Rules 1, 8(f) and 61. But, if the criterion is to be applied, petitioner should be permitted to enjoy its benefits as well as being made to suffer its consequences.

Finally, it is interesting to note respondent's view of petitioner's motion to vacate (although it is expressed for her own purposes on appeal):

> "In general, motions to vacate judgment in the District Court are governed by Rule 60 of the Federal Rules of Civil Procedure, and, although the appellant does not say so explicitly, it is apparent from her brief • • • that in the matter of her motion to vacate judgment she was relying on the 'other rea-

son' clause in paragraph (b) of Rule 60." Brief for Appellee, p. 10.

II.

In dismissing petitioner's appeal from the district court's judgment dismissing the action the Court of Appeals held that, since petitioner's second notice of appeal (App. C. p. 36) did not refer to the judgment, but rather to the denial of the post-judgment motions, such notice was insufficient to bring the judgment before the Court on review. This holding is in conflict with *United States* v. *Ellicott*, 223 U.S. 524 (1912); *Hoiness* v. *United States*, 335 U.S. 297 (1948); *United States* v. *Arizona*, 346 U.S. 907 (1953); and *State Farm Mutual Automobile Insurance Co.* v. *Palmer*, 350 U.S. 944 (1956), and represents a significant departure from a line of cases in the various Courts of Appeals. This conflict of decisions, as well as the importance of the issues of federal procedure here involved, calls for an exercise by this Court of its supervisory powers over the administration of justice in the federal courts.

In *United States* v. *Ellicott*, 223 U.S. 524, 538 (1912), this Court held that a notice of appeal referring to "the judgment rendered in the above entitled cause on the fourth day of January, 1909," which was the date of the order denying a motion for a new trial, was sufficient to raise on appeal the final judgment which had been entered May 18, 1908.

In *Hoiness* v. *United States*, 335 U.S. 297 (1948), this Court reversed a dismissal of appeal below which was based on a claimed deficiency in the notice of appeal. The only appealable order was the judgment of dismissal; the later order—the one specified in the notice of appeal—was not appealable. This Court held "that defect was of

such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress in R.S. § 954, 28 U.S.C. (1946 ed.) § 777." *Id.* at 300.[7]

See also *United States* v. *Arizona*, 346 U.S. 907 (1953), and *State Farm Mutual Automobile Insurance Co.* v. *Palmer*, 350 U.S. 944 (1956), where this Court in both instances granted certiorari and reversed, per curiam, dismissals of appeals below which were grounded on faulty notices of appeal.

The decision of the Court of Appeals is also in conflict with decisions in almost every other federal judicial circuit and, indeed, decisions in the First Circuit as well. In each of these cases a notice of appeal was held sufficient to raise the final judgment on appeal although defective in that it referred, not to the judgment, but to some other, non-appealable order.

In *Nolan* v. *Bailey*, 254 F. 2d 638, 639 (7th Cir. 1958), the notice of appeal was "from the order directing the jury to return a verdict against the plaintiffs." The notice of appeal in *Railway Express Agency, Inc.*, v. *Epperson*, 240 F. 2d 189, 192 (8th Cir. 1957), was "from the order overruling defendant's Motion for Judgment or in the Alternative for New Trial * * *." In *Creedon*

[7] The repeal of section 777 does not affect the applicability of *Hoiness* to the instant case. The legislative history of the repealing Act expressly states that the reason for the repeal was that the subject matter of section 777 was "covered by Rules 1, 15, and 61 of the Federal Rules of Civil Procedure." H. Rep. No. 308, 8th Cong., 1st Sess., p. A 239. After referring to the repeal in *Hoiness*, this Court said: "And see Rules 1, 15, 61 and 81 * * *." 335 U.S. at 300-301, n. 6. See also 28 U.S.C.A., Rule 61, Notes of Advisory Committee on Rules. Furthermore, 28 U.S.C. § 2111, in language similar to that of Rule 61, directs appellate courts to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

v. *Loring*, 249 F. 2d 714 (1st Cir. 1957), and *United States* v. *Best*, 212 F. 2d 743, 744-745, n. (1st Cir. 1954), Judge Magruder of the First Circuit did not permit faulty notices of appeal to prejudice appellant's right to have the judgment below reviewed. In *Best* the notice was "from the order denying the motion for rehearing," while in *Creedon* it was "from order denying plaintiff's motion for new trial." In denying appellee's motion to dismiss the appeal because of this faulty notice in *Creedon*, Judge Magruder said: "It is founded on pure technicality."[8]

In its petition for rehearing, petitioner called this line of cases to the attention of the Court of Appeals. In denying rehearing the Court attempted to distinguish the cases, saying that "the second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal" (App. B, p. 35). But clearly such a narrow and qualified statement of the issue in an attempt to distinguish cases that are, in principle, indistinguishable is error. Whether the intent to appeal is garnered from one notice or another, or, for that matter, from any pleading before the court, is, we submit, immaterial. What is significant is that the intent to appeal from the judgment of dismissal is, in fact, manifested to the appellate court by the actions taken and papers filed by the petitioner.

In the *Hoiness* case, *supra*, this Court said:

> "It seems to us hypertechnical to say that the *appeal papers* did not bring the sole issue of the case

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[8] See also *Conway* v. *Pennsylvania Greyhound Lines, Inc.*, 243 F. 2d 39, 40, n. 2 (D.C. Cir. 1957); *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 65, 68 (3d Cir. 1958); *United States* v. *Stromberg*, 227 F. 2d 903, 904 (5th Cir. 1955); *Holz* v. *Smullon*, 277 F. 2d 58, 61 (7th Cir. 1960); and *Cheney* v. *Moler*, 285 F. 2d 116, 117-118 (10th Cir. 1960). And see *Gunther* v. *E. I. DuPont DeNemours & Co.*, 255 F. 2d 710, 717 (4th Cir. 1958); and *Trivette* v. *N.Y.L.I.C.*, 270 F. 2d 198 (6th Cir. 1959).

fairly before the Court of Appeals." 355 U.S. at 301. (Emphasis supplied.)

The court in *Atlantic Coast Line R. Co.* v. *Mims*, 199 F. 2d 582, 583 (5th Cir. 1952), said:

> "While we agree with appellees that an appeal will not lie from an order overruling a motion for new trial, we agree with appellant that, though the order appealed from was misnamed, it clearly enough appears *from the record as a whole* that the intent was to appeal from the judgment, and that that intent should be given effect." (Emphasis supplied.)

The Fifth Circuit in *United States* v. *Stromberg, supra*, n. 8, refused to dismiss an appeal although the notice referred only to denial of appellant's motions under Rules 52(b) and 59(a), saying that, "where it is obvious that the *overriding intent* was effectively to appeal, we are justified in treating the appeal as from the final judgment." 227 F. 2d at 904. (Emphasis supplied.) And in *Sun-Lite Awning Corp.* v. *E. J. Conklin Aviation Corp.*, 176 F. 2d 344 (4th Cir. 1949), the court looked beyond the four corners of a faulty notice of appeal (which referred only to denial of a motion for rehearing) and gathered an intent to appeal from the final judgment from the Statement of Points to be relied upon on appeal as filed by appellant.

In other cases Courts of Appeals have taken jurisdiction of appeals where no formal notice was filed as required by Rule 73. In *Crump* v. *Hill*, 104 F. 2d 36 (5th Cir. 1939), the appellant filed appellee's acknowledgment of service of notice of appeal, her entry of appearance and the designation of the record on appeal, but failed to file a timely notice of appeal. Appellee accordingly moved to dismiss the appeal. In denying the motion

the court held that appellant's actions were in complete accordance with the spirit of the rules and in substantial compliance with their letter. Chief Judge Hutcheson further stated:

> "* * * [I]t would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule [73] is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights. * * * Indeed, it would we think be an exhibition of unsound reasoning and a clear abuse of judicial discretion for us to start the Rule off barnacled with the rigid and rigorous holding appellee's motion seeks." 104 F. 2d at 38.

See also *Jordan* v. *United States District Court*, 233 F. 2d 362 (D.C. Cir. 1956), where a petition for a writ of mandamus filed with the appellate court was accepted as a sufficient notice of appeal, and *Blunt* v. *United States*, 244 F. 2d 355 (D.C. Cir. 1957), where an application made in the appellate court for leave to appeal in forma pauperis was held "an unequivocal notification of intention to appeal" and sufficient to confer appellate jurisdiction. See also *Burdix* v. *United States*, 231 F. 2d 893 (9th Cir. 1956), and *Roth* v. *Bird*, 239 F. 2d 257 (5th Cir. 1956).

Applying these precedents to the instant case, there can be no doubt that the intention to appeal from the district court's dismissal of the action is manifest from the record in the case. Indeed, this case is a stronger one on this issue of intention than some of those cited, since here petitioner filed a notice of appeal (her first notice) specifically referring to the judgment of the district court dismissing the action. That such notice is held, whether

correctly or erroneously, to have been nugatory because of premature filing does not detract from its force as a clear manifestation of petitioner's intention to appeal from the judgment. The "appeal papers," the "record as a whole" and, indeed, the Statement of Points to be Relied Upon on Appeal (App. D) are eloquent of an overriding intention which the Court of Appeals disregards. In viewing the second notice of appeal *in vacuo*, as it were, the Court has rendered a decision based upon a hypertechnical view of federal procedural requirements, in conflict with the decision of this Court and those of other federal judicial circuits, and, in the words of Chief Judge Hutcheson, a decision "harking back to the formalistic rigorism of an earlier and outmoded time" and constituting "a travesty upon justice."

Finally, it would be well to note that in no wise has the respondent been misled or prejudiced by petitioner's actions in appealing this case. Nowhere in her brief before the Court of Appeals does the respondent even raise the issue whether the judgment of the district court is properly before the Court of Appeals. And, if that Court felt compelled to resolve the issue by reference to strict and technical doctrines of appellate jurisdiction, it is again, we submit, out of line with basic principles. "The rule of strict construction does not apply to the acquiring of jurisdiction by an appellate court. On the contrary, the steps taken for an appeal are to be liberally construed as appears from the cases cited * * *." *Cutting* v. *Bullerdick*, 178 F. 2d 774, 776 (9th Cir. 1949).

III.

In affirming the orders of the district court entered on January 26, 1961, denying petitioner's motions to vacate the judgment dismissing her complaint and to amend her

complaint, the Court of Appeals has, in effect, held (1) that the proffered amendment set forth a new cause of action, "an independent matter" which was not set out in the original complaint (see App. B, p. 34), and (2) that the district judge's denial of petitioner's motion to amend her complaint did not constitute an abuse of discretion. Both holdings, we submit, are in conflict with the decisions of this Court and those of a number of Courts of Appeals, as well as in violation of the basic principles of federal procedure as articulated in the cases and the Federal Rules of Civil Procedure.

Before considering the precedents it would be well to focus upon the facts pertinent to this aspect of the case. Petitioner's complaint alleges an agreement whereunder she was to provide for the care of her mother and was to receive, in turn, upon the death of her father, her intestate share of his estate—two-thirds of approximately $60,000. Petitioner further alleges full performance of her part of the agreement by furnishing and paying for the care of her mother (Complaint, par. 3, R.A. 3), and prays for judgment in the amount of $40,000.

The proffered amendment to the complaint (R.A. 11-12) repeats the first paragraph of the original complaint (R.A. 2), claims a jury trial, and prays for judgment in the amount of $12,500, representing "'monies paid by the plaintiff for and on behalf of the defendant and for services rendered for and on behalf of the defendant * * *'" (R.A. 11-12).

Thus the only new matter contained in the amendment is a specification of the dollar amount claimed to be owed

[9] References to the "defendant" are clearly intended to read "decedent." Although respondent bases an argument upon this obvious slip (Brief for Appellee, pp. 12-13), the Court of Appeals did not refer to it as a ground for its holding and, apparently, took this minor discrepancy for what it was.

petitioner for her services and expenditures and a prayer for judgment in that amount and for jury trial. Obviously, all the amendment sought to accomplish was the addition of a count in quantum meruit to what had been a straight action for damages for breach of contract. To hold that damages based on quantum meruit cannot be obtained in an action for breach of contract, to deny permission to add such a count to the complaint, and to base these rulings on the characterization of the quantum meruit count as a new action or "independent matter" is manifest error and in conflict with the decisions of this Court, the Courts of Appeals of other circuits, and the spirit of liberality in pleading and procedure as embodied in the Federal Rules. Petitioner argues, *first*, that the quantum meruit count could have been properly recovered upon under the original complaint and that an amendment was therefore not necessary; and, *second*, that, if amendment is necessary or desirable, a refusal to grant leave to amend constitutes an abuse of judicial discretion.

(1)

In *Friederichsen* v. *Renard*, 247 U.S. 207 (1918), the plaintiff, claiming to have been defrauded in an exchange of lands, brought suit in the district court to annul the contract and deed and for incidental damages. The court, finding that plaintiff had affirmed the contract by acts of ownership, transferred the case to the law side as an action for damages for deceit. The bill was appropriately amended to conform to a law action, adding a prayer for a judgment in damages, but effecting no substantial change in the allegations of fraud. Meanwhile the statute of limitations had expired and, on this ground, the district court ordered a directed verdict in favor of the defendants. The Court of Appeals for the Eighth Circuit

affirmed on the ground that the amended complaint set forth "a new action at law, directly opposed to the theory stated in the bill," and therefore the amended complaint did not relate back to the commencement of the action. 231 Fed. 882, 885. This Court granted certiorari and reversed the decisions below, stating that it considered it settled—

> "* * * that the conversion of a suit in equity into an action at law or *vice versa* is not alone sufficient to constitute the beginning of a new action and that with respect to the statute of limitations it is a mere incident in the progress of the original case." 247 U.S. at 210.

But more in point and particularly apropos to the instant case is the following from 247 U.S. at 210:

> "But the allegations of fraud in the two papers are the same in substance, and practically the same in form, the only substantial difference between them being that the prayer for relief in the bill is for mutual return of lands, with incidental damages, while, in the amended petition, it is for damages alone. *The cause of action is the wrong done, not the measure of compensation for it, or the character of the relief sought, and, considered as a matter of substance, the change in the statement of that wrong in the amended petition cannot in any just sense be considered a new or different cause of action.*" (Emphasis supplied.)

One of the grounds relied upon by the Court of Appeals in the instant case in characterizing the quantum meruit count as "an independent matter" from the original claim for damages for breach of contract is that it proceeded "upon a different theory" (App. B, p. 34).

This was one of the grounds relied upon by the Court of Appeals in *Friederichsen, supra,* and the reversal of that case by this Court is eloquent of the invalidity of the "different theory" test. This is confirmed by *United States* v. *Memphis Cotton Oil Co.,* 288 U.S. 62, 67-68 (1933), where Mr. Justice Cardozo, speaking for this Court, held that a change in legal theory was no longer accepted as the test in determining whether a claim is a new action or whether it constitutes part of a pending action.

In *Hutches* v. *Renfroe,* 200 F. 2d 337, 341 (5th Cir. 1952), the court held that, where the facts alleged in a complaint entitle the plaintiff to certain relief, but such relief is not clearly prayed for, "it is the duty of the court to grant the relief to which the plaintiff is entitled, irrespective of the prayer for relief." And even where a defective theory of relief is pursued in the complaint, the court was "in no doubt that plaintiff is entitled to the relief to which the proven facts entitle him, even though his own legal theory of relief may have been unsound." 200 F. 2d at 340.

The Federal Rules of Civil Procedure require the same result. Rule 54(c) provides, in part:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

That recovery on a quantum meruit theory is possible in a situation such as that presented in the instant case is certainly clear as a matter of Massachusetts law, which, although not binding on this aspect of the case, is further evidence of the generally accepted rules which were dis-

regarded by the courts below. Thus in *Shopneck* v. *Rosenbloom*, 327 Mass. 81, 84 (1950), cited in both briefs before the Court of Appeals, the court states:

> "The 'rule is that if a plaintiff has paid money, conveyed property, or rendered services under an oral agreement within the statute of frauds, which agreement the defendant wholly refuses to perform, he can recover the money paid, or the value of the property conveyed, or of the services rendered; in that case there is a total failure of consideration and the plaintiff can recover the value of any benefit inuring to the defendant as a result of the transaction.'"

Finally, it is anomalous to note that the holding of the Court of Appeals that a count in quantum meruit is "an independent matter" from an action for breach of contract is stricter and more technical than required even by the old rules of common-law pleading under the forms of action. Thus in *Parker* v. *Macomber*, 17 R.I. 674, 24 Atl. 464, 16 L.R.A. 858 (1892), a case somewhat similar on its facts to the instant case, it was held that a declaration in an action of assumpsit not containing a count in quantum meruit was nevertheless sufficient as a basis for recovering the value of services performed by the plaintiff pursuant to a contract although damages for breach could not, as such, be recovered under the facts of the case. See also *Norris* v. *School District in Windsor*, 12 Me. 293, 298 (1835). In 1 Chitty on Pleading 353* (16th Am. ed. 1876), it appears:

> "Under an *indebitatus* count the plaintiff may recover what may be due him, although no specific price or sum was agreed upon; and therefore it has been observed that the *quantum meruit* and *quantum valebant* counts are in no case necessary * * *."

It is clear, in view of the precedents cited, that the Court of Appeals has acted in violation of the "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 44-45 (1957). This action by the court below, in violation of the mandate of this Court as well as basic, general principles of construction of pleadings in the federal courts, indicates the need of review by this Court.

(2)

Even assuming, however, that the complaint should have been amended, the denial of permission to amend constitutes abuse of discretion. Rule 15(a) requires that leave to amend "be freely given when justice so requires." Again and again the various Courts of Appeals have made it clear that Rule 15(a) places a duty on the courts to allow a litigant to have his day in court by permitting him to correct pleading in some respect deficient. Thus in *Dowdy* v. *Procter & Gamble Mfg. Co.*, 267 F. 2d 827 (5th Cir. 1959), Chief Judge Hutcheson said, assuming that the complaint failed to state a claim, yet the district judge was in error for dismissing the complaint without granting leave to amend. See also *Pioche Mines Consol., Inc.*, v. *Fidelity-Philadelphia Trust Co.*, 206 F. 2d 336 (9th Cir. 1953): "In view of the liberal spirit as regards amendments displayed in Rule 15 F.R.C.P., we think Pioche should have been given opportunity by amendment to cure if it could the shortcomings of the counterclaim indicated by the judge." *Id.* at 337; *Dunn* v. *J. P. Stevens & Co.*, 192 F. 2d 854, 856 (2d Cir. 1951); *Peterson Steels, Inc.*, v. *Seidmon*, 188 F. 2d 193, 196 (7th Cir. 1951).

In *Blake* v. *Clyde Porcelain Steel Corp.*, 7 F.R.D. 768 (D.C. S.D. N.Y. 1944), plaintiff filed a motion to amend his complaint, which made claim for moneys due but not paid under an employment contract. The proposed amendment, as in the instant case, sought to add a count in quantum meruit. In permitting amendment the district judge said: "Rule 15(a) states that 'leave' to amend 'shall be freely given when justice so requires', and if plaintiff has a valid cause of action upon any theory, he should be afforded opportunity to assert it." 7 F.R.D. at 769.

Thus Rule 15(a) is a vital, living part of the Federal Rules—one whose significance to litigants the courts have recognized. In the instant case, however, there is no opinion by the district court explaining his denial of leave to amend; and, on this basis, the Court of Appeals finds "nothing presented by the record to show the circumstances which were before the district court for its consideration in ruling on the motions" and cannot say, therefore, that the district court abused its discretion. Nowhere is there a mention of Rule 15(a) or a discussion of petitioner's rights under that rule. Even before the advent of the Federal Rules, this Court had "fixed the limits of amendment with increasing liberality." *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933). The courts below have, we submit, acted in disregard of the letter and the spirit of Rule 15(a), and this Court should review this important question of pleading in the federal courts.

If extenuating circumstances are necessary before an amendment may be allowed—and we vigorously deny that such is the law—then such circumstances were clearly presented in this case and should have been noticed by the Court of Appeals. From the memorandum of decision of the district judge (R.A. 7, esp. 8-9) as well as the briefs submitted by both parties it should have been clear that,

in framing her complaint, the petitioner relied on a decision of the First Circuit which stood unreversed, *Cleaves* v. *Kenney*, 63 F. 2d 682 (1933). Petitioner could assume that a district judge in the Circuit would consider himself bound by that decision (see pp. 12-14 of Brief for Appellant). When, however, the district judge refused to follow the earlier precedent rendered by his superior tribunal and dismissed the complaint, is it not in order that petitioner be given leave to amend? Denial of leave, and affirmance of such denial, are, we submit, clear abuses of judicial discretion, calling for an exercise by this Court of its supervisory powers over the administration of justice in the federal courts.

onclusion.

In conclusion, in view of the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to the United States Court of Appeals for the First Circuit, to the end that the appeal may be heard on its merits.

Respectfully submitted,
MILTON BORDWIN.

Dated, Boston, Massachusetts,
November 10, 1961.

Appendix A.

Statutes and Rules Involved.

United States Code, Title 28, sec. 777 (repealed June 25, 1948, 62 Stat. 992, c. 646, sec. 39):

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

United States Code, Title 28, sec. 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

United States Code, Title 28, sec. 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Federal Rules of Civil Procedure.

Rule 1:

"• • • [These rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 8(f):

"All pleadings shall be so construed as to do substantial justice."

Rule 15(a), (c):

(a) "• • • and leave [to amend] shall be freely given when justice so requires."

(c) "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Rule 54(c):

"• • • Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Rule 59(e):

"A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 60(b):

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment."

Rule 61:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 73(b):

"The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. • • •"

Appendix B.

Opinion of the Court of Appeals.

June 26, 1961.

HARTIGAN, *Circuit Judge.* Plaintiff in the instant case appeals from a judgment of the United States District Court for the District of Massachusetts entered following the allowance of defendant's motion to dismiss and from orders of the district court denying plaintiff's motion to vacate judgment and to amend her complaint.

The action involves an oral agreement between the plaintiff, Lenore Foman, and her father, Wilbur W. Davis, the decedent, by which decedent agreed to refrain from making a will and to die intestate and plaintiff agreed to assume and pay all expenses for the care and maintenance of decedent's wife who was also the plaintiff's mother. Under the alleged agreement, plaintiff would receive a child's share according to the laws of intestacy of the Commonwealth of Massachusetts. Plaintiff alleged the making of this oral agreement and her subsequent fulfillment of her obligations under it. Plaintiff alleged that her father, in breach of the agreement, executed a Last Will and Testament, duly allowed in the Probate Court for the County of Middlesex, by which he devised and bequeathed virtually all of his estate to defendant, who was his second wife, and bequeathed nothing to the plaintiff. This suit was brought against Elvira A. Davis, decedent's widow and executrix.

Defendant filed an answer which denied the making of such agreement and set up various defenses, among them, the bar of the statute of frauds. Defendant on the same day also filed a motion to dismiss the action.

The district judge granted the motion to dismiss on the ground that the action on the oral contract was barred by

the Massachusetts statute of frauds and judgment was entered on December 19, 1960.

On December 20, 1960 plaintiff filed a motion to vacate the order granting defendant's motion to dismiss and the judgment thereon in order to permit plaintiff to file a motion to amend her complaint by adding a second cause of action for monies paid and services rendered for and on behalf of the decedent. Plaintiff at the same time filed a motion to so amend and attached the proposed amendment.

On January 17, 1961 plaintiff filed a notice of appeal from the judgment entered December 19, 1960. Subsequently on January 23, 1961 the district court held a hearing on plaintiff's motions of December 20, 1960 and denied each motion. A notice of appeal from the denial of these motions was filed by plaintiff on January 26, 1961.

Preliminarily there is a question of what is properly before us on appeal. A motion under F.R.Civ.P. 59(e) to alter or amend the judgment terminates the running of the time for taking an appeal. See Rule 73. However, a motion under Rule 60(b) does not affect the finality of a judgment or suspend its operation. The plaintiff's motion seeking the vacating of the dismissal order and judgment does not designate the rule under which it is brought. If the motion to vacate the dismissal order and judgment thereon is construed as one under Rule 59(e), then the appeal taken on January 17, 1961 from the judgment entered on December 19, 1960 was premature, since the running of the time for appeal is terminated by a timely motion under Rule 59(e) and the motion had not yet been disposed of by the district court. See Rule 73; 7 Moore, Federal Practice ¶73.09 [6] (2d ed. 1955). On the other hand, if said motion is construed as an effective Rule 60(b) motion, then the finality of the judgment would not have been suspended

and the January 17, 1961 appeal would be properly before us.

Although the cases do authorize the vacating of a judgment under both rules in the proper circumstances, *Klapprott* v. *United States*, 335 U. S. 601, 615 (1948), judgment modified 336 U. S. 942 (1949); *Patapoff* v. *Vollstedt's Inc.*, 267 F.2d 863 (9 Cir. 1959); *Kelly* v. *Delaware River Joint Commission*, 187 F.2d 93 (3 Cir.), cert. denied, 342 U. S. 812 (1951); 6 Moore, Federal Practice ¶59.12 [1] (2d ed. 1953), we believe that the full context of the rules dictates that resort should be made to the procedure under Rule 59 if time for applying for such motions has not expired. Cf. *Chicago & N. W. Ry. Co.* v. *Davenport*, 95 F.Supp. 469 (S.D.Iowa 1951) which is criticized in 7 Moore, Federal Practice ¶60.27 [2], p. 306 n.23 (2d ed. 1955). We are unable to find any case which construed a motion to vacate a judgment made within 10 days of the judgment as a Rule 60(b) motion so that an appeal taken before a disposition of the motion would be timely. Plaintiff's second notice of appeal could have specified the judgment of December 19, 1960. Lacking such reference, we believe that the appeal insofar as the judgment is concerned must be dismissed. See *Aberlin* v. *Zisman*, 244 F.2d 620 (1 Cir.), cert. denied 355 U. S. 857 (1957).

In regard to the contention that the district court abused its discretion in not allowing plaintiff's motions to vacate the judgment and amend her complaint, there is nothing presented by the record to show the circumstances which were before the district court for its consideration in ruling on the motions. We, therefore, cannot say that the district court abused its discretion.

Judgment will be entered dismissing the appeal insofar as it is taken from the district court's judgment entered December 19, 1960; and affirming the orders of the district court entered January 26, 1961.

Opinion of the Court of Appeals.

ON PETITION FOR REHEARING.

August 17, 1961.

HARTIGAN, *Circuit Judge*. Plaintiff's petition for rehearing seeks to read into our opinion much broader principles than are justified or were intended. In holding that the second notice of appeal did not bring before us the propriety of the judgment of dismissal we did not intend to overrule or qualify our earlier cases, of which *Creedon* v. *Loring*, 249 F.2d 714 (1 Cir. 1957), cited by plaintiff, is an example. In *Creedon* v. *Loring*, following the entry of judgment for the defendants upon verdicts of the jury, plaintiffs filed a motion for a new trial. After that motion had been denied, plaintiffs appealed "from the order . . . denying plaintiff's motion for a new trial." The defendants moved to dismiss the appeal as not having been taken from the final judgment. We denied this motion as "founded on a pure technicality." We pointed out, however, that plaintiffs were limited in their appeal to those alleged errors "on which the motion for the new trial was based; it is not open to appellant to urge other alleged errors at the trial which might have been presented on an appeal from the original judgment itself." Id. at 717.

Similarly, other circuits have recognized that an appeal from the denial of a new trial may carry back to the judgment in which the errors sought to be rectified by the motion occurred. See, e.g., *Cheney* v. *Moler*, 285 F.2d 116, 118 (10 Cir. 1960); *Holz* v. *Smullan*, 277 F.2d 58 (7 Cir. 1960). In *Donovan* v. *Esso Shipping Company*, 259 F.2d 65 (3 Cir. 1958), cert. denied, 359 U.S. 907 (1959), the court said: "A defective notice of appeal should not warrant dismissal for want of jurisdiction where the intention to appeal from a specific judgment may be reasonably

inferred from the text of the notice and where the defect has not materially misled the appellee. . . . For example, an appeal from the denial of a new trial may under exceptional circumstances be treated as an inept attempt to appeal from the judgment which preceded that denial." However, the court went on to say: "While mere technical omissions in the notice of appeal should not deprive appellant of his right of review, where the appeal is taken specifically only from one part of the judgment the appellate court has no jurisdiction to review the portion not appealed from." Id. at 68. The notice of appeal in that case specifically sought review of the dismissal of all causes of action "other than that cause of complaint on maintenance and cure." The court held it was without jurisdiction to consider the maintenance and cure question. All of these cases, however, indicate that the determinative element is one of intent, i.e., whether the intent to appeal from the judgment may be reasonably inferred from the notice of appeal.

In the case at bar, following the original judgment of dismissal, plaintiff did not move for review or reconsideration, comparable to a motion for a new trial, but moved for leave to amend the complaint by adding a self-styled "Second Cause of Action," by which she sought substantially less damages, upon a different theory, predicated on the assumption that the dismissal of the first cause of action was in fact correct. This was, by hypothesis, an independent matter. Any error involved in the denial of this motion for leave to amend could relate back in no way to errors which entered into and infected the original judgment. Also, militating against plaintiff's position that the second notice of appeal was intended to be an appeal from the original judgment of dismissal is the factor that plaintiff plainly thought she appealed from that judgment by her first notice of appeal. Now that that

notice of appeal has been held premature, plaintiff contends that the second notice of appeal is sufficient. We believe, however, that under the principles of the above-cited cases, plaintiff's second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal.

If plaintiff's second appeal was in her mind intended to encompass the old cause of action rather than, or in addition to, the proposed new one, it was deficient not technically, but in substance.

The petition for rehearing is denied.

Appendix C.

First Notice of Appeal.

[Title and Caption omitted.]

Notice is hereby given that Lenore Foman, plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit from the final Judgment entered in this action on December 19th, 1960.

GUTERMAN, HORVITZ & RUBIN
HENRY N. SILK
Attorney for the Appellant, Lenore Foman
50 Congress Street
Boston, Massachusetts

Filed: Jan. 17, 1961

Second Notice of Appeal.

[Title and caption omitted.]

Notice is hereby given that Lenore Foman, plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit from the orders entered in this action on January 23, 1961 denying (a) Plaintiff's Motion to Vacate Judgment on Defendant's Motion to Dismiss and (b) Plaintiff's Motion to Amend Her Complaint.

GUTERMAN, HORVITZ & RUBIN
HENRY N. SILK,
Attorney for the Appellant Lenore Foman
50 Congress Street
Boston, Massachusetts

Filed: Jan. 26, 1961

Appendix D.

Statement of Points to be Relied Upon by the Plaintiff-Appellant, Lenore Foman.

[Title and caption omitted.]

Now comes the plaintiff-appellant, Lenore Foman (hereinafter called the plaintiff), by her attorney and states that the points upon which she intends to rely in the herein appeal are as follows:

1. The complaint of the plaintiff wherein she seeks recovery for the breach of an oral agreement of the defendant's testator to die intestate sets forth an agreement which is valid and enforceable under the law of the Commonwealth of Massachusetts.

2. Neither Section 1, clause 4 nor Section 5 of Chapter 259 of the General Laws of Massachusetts apply to an oral agreement by the testator to die intestate.

3. The Massachusetts law applicable to the plaintiff's cause of action, as interpreted by the Court of Appeals of this circuit in *Cleaves* v. *Kenny*, 63 F. 2d 682, remains unchanged, and such decision has neither been challenged, weakened nor overruled by any subsequent decision of this circuit, the Supreme Judicial Court of Massachusetts or by statute.

4. The plaintiff had a right to assume that a District Court of the United States would follow the decisions of the Court of Appeals for its circuit, irrespective of what the District Court might think the law should be in a particular matter, and to assume further that if the District Court chose not to follow the Court of Appeals, leave to amend would be freely given to the plaintiff especially where the facts alleged by her set forth alternative causes of action.

5. The facts set forth in the plaintiff's complaint establish a cause of action upon the theory either of an express contract or on a quantum meruit recognizable under the law of Massachusetts, and the failure to grant leave to amend at the time that the defendant's Motion To Dismiss was allowed was error.

6. The basic and comprehensive principle upon which the Federal Rules of Civil Procedure is founded is that controversies should be decided upon their merits.

7. Full fealty and not merely lip service is accorded by the federal courts to the language of Rule 15(a) of the Federal Rules of Civil Procedure that permission is to be freely given to amend pleadings when justice so requires.

8. The District Court erred in denying permission to the plaintiff to vacate the judgment on the defendant's Motion To Dismiss and in not permitting the plaintiff to amend her complaint where such permission was necessary to further justice and particularly where the District Court chose not to follow a decision of the Court of Appeals upon which the plaintiff had a right to rely.

9. The denial by the District Court of the plaintiff's motions was contrary to the spirit of liberality of the Federal Rules of Civil Procedure that amendments to pleadings should be freely allowed particularly where the refusal to permit such amendments will work a grave injustice upon the plaintiff and in no manner will prejudice the defendant

By her attorney,

HENRY N. SILK
GUTERMAN, HORVITZ & RUBIN
50 Congress Street
Boston, Massachusetts

[Certificate of Service dated March 3, 1961, omitted in printing.]

Supreme Court of the United States.

OCTOBER TERM, ~~1961~~. 62

No. 3~~~~
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LENORE FOMAN,
Petitioner,

v.

ELVIRA A. DAVIS, EXECUTRIX,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

ROLAND E. SHAINE,
BROWN, RUDNICK, FREED & GESMER,
85 Devonshire Street,
Boston, Massachusetts,
Attorneys for Respondent.

RICHARD R. CAPLES,
161 Harvard Avenue,
Allston, Massachusetts,
Of Counsel.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1961.

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LENORE FOMAN,
Petitioner,

v.

ELVIRA A. DAVIS, EXECUTRIX,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Opinions Below.

The opinion of the Court of Appeals is reported in 292 F. (2d) 85, and the opinion of said Court on the Petition for Rehearing is reported in 292 F. (2d) 88.

Counter-Statement of Questions Involved.

1. Whether an appeal to the Court of Appeals is a nullity and properly dismissed as premature if taken from a District Court judgment as to which there is an outstanding motion to vacate and to amend made within ten days of entry of the judgment.

2. In the case of a District Court's denial after judgment of motions which in substance are for leave to amend a complaint, whether an appeal from such denial is sufficient to bring the judgment itself before the Court of Appeals.

3. Whether the District Court abused its discretion in denying a motion to vacate judgment to permit amendment, and a motion to amend the complaint by adding a count, after the action had been dismissed.

4. Whether in the decision of the Court of Appeals there was any departure from or conflict with decisions of other Courts of Appeals or of this Court.

Counter-Statement of the Case.

The complaint in this action alleges an oral agreement "at or about 1947" (R. 2-3) between the petitioner and her father, the decedent, Wilbur W. Davis, whereby the petitioner agreed to assume and pay all expenses for the care, treatment and maintenance of her mother, decedent's first wife, and to look after and care for her as long as she lived, and the decedent, in consideration therefor, agreed to make and leave no will, to the end that the petitioner, as his only child, would receive the share of his estate to which she would be entitled under the intestacy laws of Massachusetts.

The complaint further alleges that the petitioner performed her part of the agreement until the death of her mother in 1953; that in 1957 the decedent married the respondent, Elvira A Davis; that Wilbur W. Davis died in 1959, leaving an estate of approximately $60,000 and a will which has been duly probated in Massachusetts and of which the respondent is executrix.

Except for a bequest of $5,000 to his brother, the decedent by the terms of his will "demised and bequeathed"

(R. 4) his entire estate to the respondent. The petitioner seeks damages in the amount of $40,000, the share of the estate which she would have received as his only child if Wilbur W. Davis had died intestate.

Respondent moved to dismiss in the District Court (R. 7) and, after hearing, judgment was entered on December 19, 1960, dismissing the complaint (R. 10) in accordance with a memorandum of decision which had been previously filed (R. 7).

On December 20, 1960, the petitioner moved to vacate judgment "in order to permit [her] to file a Motion to Amend her Complaint by adding a second cause of action" (R. 10). On the same date the petitioner also moved to amend her complaint in accordance with an amendment simultaneously proposed (R. 11-12). The proposed amendment, entitled "Second Cause of Action," alleged that the petitioner paid money and rendered services for and on behalf of the respondent, Elvira A. Davis.

The petitioner then filed, on January 17, 1961, notice of appeal to the Court of Appeals from the judgment of December 19, 1960 (P. 36). Later, on January 23, 1961, there was a hearing on petitioner's motions to vacate judgment and to amend her complaint, and both motions were denied that day (R. 2). On January 26, 1961, the petitioner filed a notice of appeal from the denial of her motions (P. 36).

On June 26, 1961, the Court of Appeals dismissed the appeal insofar as taken from the District Court's judgment of December 19, 1960, and affirmed the orders of the District Court of January 23, 1961 (P. 30-32). On August 17, 1961, a petition for rehearing was denied by the Court of Appeals (P. 33-35).

Petition for writ of certiorari was filed in this Court on November 14, 1961.

Jurisdiction in the District Court was based entirely on diversity of citizenship (R. 2). The question involved on respondent's motion to dismiss, on which the District Court entered judgment for the respondent, was wholly a question of Massachusetts law, namely whether an oral agreement to make and leave no will is enforceable or binding under the law of the Commonwealth of Massachusetts. The Massachusetts court has never had occasion to decide the question specifically. The principal authority adduced by the petitioner was *Cleaves v. Kenney*, 63 F. (2d) 682, decided by a divided court in 1933 by the Circuit Court of Appeals for the First Circuit.

Argument.

I. Under the Federal Rules of Civil Procedure, Petitioner's Motion to Vacate Judgment having been Made within Ten Days of Entry of Judgment and Not being Disposed of when Appeal from the Judgment was Taken, that Appeal was a Nullity and Properly Dismissed as Premature.

Petitioner argues that the Court of Appeals should have treated her motion to vacate judgment as having been brought under Rule 60, so that then the notice of appeal filed January 17, 1961, would not have been premature and the Court of Appeals would have reached the merits of the judgment entered by the District Court (P. 8).

In making that contention petitioner is evidently oblivious of its implications. If petitioner's motion to vacate had been treated as brought under Rule 60, thereby leaving the finality of the judgment unaffected, the appeal taken on January 17, 1961, would have been rendered effectual, but at the same time the District Court would

have been deprived of jurisdiction to entertain petitioner's motion to vacate the judgment.

Daniels v. *Goldberg*, 8 F.R.D. 580 (D.C. S.D. N.Y. 1949); affd. 173 F. (2d) 911 (C.A. 2d Cir. 1949).

Switzer v. *Marzall*, 95 F. Supp. 721, 722-723 (D.C. D.C. 1951).

United States v. *Frank B. Killian Co.*, 269 F. (2d) 491, 494 (C.A. 6th Cir. 1959).

That posture of affairs would no more have suited the petitioner than the present situation.

Indeed, a manifest purpose of Rule 73, in suspending the finality of a judgment upon a timely motion under Rule 59, was to spare the petitioner and all other litigants from the dilemma of having to choose between the prosecution of an appeal and the prosecution of motions brought after judgment but not disposed of as the appeal period is about to expire.

See *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177-178 (1944), referred to in Report of Proposed Amendments Prepared by the Advisory Committee on Rules for Civil Procedure, June, 1946, House Document No. 473, 80th Congress, 1st Session, p. 139; *Stevens* v. *Tuttle*, 222 F. (2d) 352 (C.A. 7th Cir. 1955); and *Gaudiosi* v. *Mellon*, 269 F. (2d) 873, 877 (C.A. 3d Cir. 1959), cert. den. 361 U.S. 902 (1959).

Petitioner is, of course, correct in saying that procedure should not be made into a "game" (P. 7). But, in the case at bar, to have treated petitioner's motion to vacate

under Rule 60 rather than Rule 59 would have been to subvert the very system of appeals and post-judgment motions so carefully created by Rules 59, 60 and 73.

From the foregoing we see why there can be no quarrel with the view of the Court of Appeals that "the full context of the rules dictates that resort should be made to the procedure under Rule 59 if time for applying for such motions has not expired" (P. 32).

The finality of the judgment having been suspended by the motion to vacate and that motion not having been disposed of by the District Court when the appeal was taken on January 17, 1961, the appeal was properly dismissed as premature and a nullity.

United States v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944).

Gaudiosi v. *Mellon*, 269 F. (2d) 873, 877 (C.A. 3d Cir. 1959); cert. den. 361 U.S. 902 (1959).

Stevens v. *Turner*, 222 F. (2d) 352 (C.A. 7th Cir. 1955).

Kelly v. *Pennsylvania Railroad Co.*, 228 F. (2d) 727 (C.A. 3d Cir. 1955); cert. den. 351 U.S. 925 (1956).

II. By Any Reasonable Standard, the Appeal Taken by Petitioner from the Post-Judgment Orders of the District Court was Insufficient to Bring the Judgment Itself before the Court of Appeals.

Certain provisions of the statutes and rules require consideration at this point.

Section 1291 of Title 28 of the United States Code provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

Section 2107 of Title 28 provides:

> "... No appeal shall bring any judgment ... before a court of appeals for review unless notice of appeal is filed, within thirty days after entry of such judgment. ..."

Rule 73 (a) of the Federal Rules of Civil Procedure provides:

> "A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal."

Rule 73 (b) provides:

> "The notice of appeal ... shall designate the judgment or part thereof appealed from. ..."

A. In the foregoing provisions of the statutes and rules is described an objective system for the orderly prosecution of appeals.

It is a system premised, first of all, upon the existence of a "final" decision or judgment. As pointed out above (I, *supra*), an appeal taken from a judgment before the judgment has become final is premature and must be dismissed as a nullity.

Beyond the requirement that there be a final decision or judgment, there must be a timely notice of appeal which designates the judgment or part thereof from which appeal is being taken.

In the case at bar the notice of appeal filed January 26, 1961, by the petitioner designated only the orders of the District Court made on January 23, 1961, denying her motion to vacate judgment and to amend her complaint. The motion to vacate judgment was explicitly "in order to permit the plaintiff to file a Motion to Amend her Complaint by adding a second cause of action . . . in accordance with [the] Motion herewith filed" (R. 10).

Viewed as a notice of appeal for the purpose of taking an appeal from the judgment of December 19, 1960, the notice of appeal of January 26, 1961, is patently deficient as a matter of substance.

> *Carter* v. *Powell*, 104 F. (2d) 428, 430 (C.A. 5th Cir. 1939); cert. den. 308 U.S. 611 (1939).
> *Gannon* v. *American Airlines, Inc.*, 251 F. (2d) 476, 482 (C.A. 10th Cir. 1957).

To make up for that deficiency in substance as the petitioner suggests, by means of a transfusion from the ghost of an abortive appeal, does not appear to be the way to sound judicial administration.

We are not dealing here with "one of those technicalities to be easily scorned" (*Radio Station WOW, Inc.*, v. *Johnson*, 326 U.S. 120, 124 (1945)). Regarded as a matter involving nothing more than an application of rules, the Court of Appeals was at least within its discretion under Rule 73 (a) to take, on its own initiative, the action which in this instance it deemed appropriate, namely, limiting the effect of the notice of appeal filed January 26, 1961, as an appeal only from the orders therein designated.

> *Federal Deposit Insurance Corp.* v. *Congregation Poiley Tzedeck*, 159 F. (2d) 163, 166 (C.A. 2d Cir. 1946).

See *Georgia Hardwood Lumber Co.* v. *Compania de Navegacion Transmar, S.A.*, 323 U.S. 334, 336 (1945).

B. In truth, the case at bar involves more than an application of rules. The notice of appeals filed January 26, 1961, actually limited the jurisdiction of the Court of Appeals to a review of the orders of January 23, 1961.

Donovan v. *Esso Shipping Co.*, 259 F. (2d) 65 (C.A. 3d Cir. 1958); cert. den. 359 U.S. 907 (1959).

To have given that notice of appeal any wider effect would have enlarged the scope of the review and so would have been a step clearly beyond the discretion which the Court of Appeals has to disregard procedural irregularity of no substance.

Reconstruction Finance Corp. v. *Prudence Securities Advisory Group*, 311 U.S. 579, 582-583 (1941).

Georgia Hardwood Lumber Co. v. *Compania de Navegacion Transmar, S.A.*, 323 U.S. 334, 336 (1945).

A Court of Appeals must, of course, always satisfy itself as to its jurisdiction even though the matter is not raised by either of the parties.

Canadian Indemnity Co. v. *Republic Indemnity Co.*, 222 F. (2d) 601 (C.A. 9th Cir. 1955).

7 Moore, Federal Practice, ¶ 73.09[6], n. 3 (2d ed. 1954).

C. We come now to the question whether or not the notice of appeal of January 26, 1961, limited as an appeal from the orders of January 23, 1961, could in any way carry back to the judgment of December 19, 1960, any errors which the motions affected by those orders sought to rectify. In a review of the orders of January 23, 1961, what, if anything, would be involved which was also involved in the judgment?

As the Court of Appeals itself pointed out in its opinion on the petition for rehearing (292 F. (2d) 88), the petitioner's motion to vacate did not ask reconsideration comparable to the reconsideration implicit in a motion for a new trial. Petitioner moved, in substance, for leave to amend her complaint by adding a "Second Cause of Action." Such a motion being predicated on the assumption that the dismissal of the original cause of action was correct, the Court of Appeals was right in saying (292 F. (2d) 88):

> "Any error involved in the denial of this motion for leave to amend could relate back in no way to errors which entered into and infected the original judgment."

D. In her petition (P. 12), petitioner says:

> "We do not argue in favor of resort to a pleader's intention—indeed, we argue that all such nebulous desiderata give way to the basic and essential principles of federal procedure."

Even though we would not entirely abandon the element of intent, so ably expressed by the Court of Appeals in its opinion on the petition for rehearing (292 F. (2d)

88), we submit that the foregoing analysis is worked out in accordance with the standards which petitioner seems to regard as desirable.

III. Denial of Petitioner's Motion to Vacate Judgment so as to Permit her to Amend her Complaint, and Denial of her Motion to Amend her Complaint, were Proper.

A. In her petition (P. 18-24), petitioner makes an extended argument to the effect that an amendment to her original complaint was really unnecessary as a matter of law, notwithstanding her efforts to amend, because damages in quantum meruit are recoverable in an action for breach of contract. She makes this argument in criticism of the affirmation by the Court of Appeals of the orders of the District Court denying her motion to vacate judgment so as to permit her to amend her complaint and also denying her motion to amend.

Whatever the merit or lack of merit of this argument in the abstract, its only pertinence to the propriety of the District Court's orders on the motions in question is to point out that they were essentially innocuous, the gist of petitioner's grievance relating truly to the District Court's dismissal of her complaint.

The reference of the Court of Appeals to the motions to vacate and amend as attempting to set up "an independent matter" was made only in respect to the issue of whether petitioner's appeal from their denial could be considered to relate back in any way to any errors which may have entered into or "infected" the original judgment of the District Court (292 F. (2d) 88).

Petitioner's extended argument on this point can be taken to be no more than a poorly concealed effort to show

this Court what she would now like to argue to the Court of Appeals if given the chance.

B. As in her brief in the Court of Appeals, petitioner in her petition in this Court persists in the argument that due liberality was denied her in the matter of amending her complaint, particularly in view of *Cleaves* v. *Kenney*, 63 F. (2d) 682 (C.A. 1st Cir. 1933).

It must be remembered in this connection that, although *Cleaves* v. *Kenney* is on the books, the Massachusetts court has never had occasion to decide a case specifically involving the enforceability under Massachusetts law of any oral agreement to die intestate.

Against that background it should be readily apparent that petitioner made a conscious choice in framing her complaint exclusively as an action on the alleged agreement rather than as both an action on the agreement and an action in quantum meruit.

This choice involved an obvious risk, not only of the ever-present possibility that the law was not as petitioner conceived it to be, but, more fundamentally, the risk that she might be barred from later commencing a new action by Massachusetts General Laws (Ter. Ed.) chapter 197, section 9, which requires an action against an executor to be commenced within a year from his giving bond (see R. 2).

Petitioner's choice, indeed, can be said to have been a deliberate and calculated choice, in which she carefully selected the federal forum for the intended purpose of exploiting what she considered to be a fortuitous opportunity and in which she eschewed a count in quantum meruit in favor of a bold attack.

It is not a matter of justice, least of all in the case of a claim of the nature here presented, to relieve the petitioner

of the consequences of a conscious, deliberate, calculated, free choice which hindsight has indicated was wrong.

C. A reading of the "Second Cause of Action" proposed by petitioner in her motion to amend her complaint (R. 11-12) will disclose at once that it fails completely to allege any action which relates to the allegations in the original complaint (R. 2-4). The original complaint, it will be recalled, claims damages for breach of contract from the estate of Wilbur W. Davis on the ground that the petitioner, *for and on behalf of Wilbur W. Davis*, provided and paid for care and maintenance of his first wife in consideration of his alleged promise, later unfulfilled, to die without making a will. In contrast, the proposed "Second Cause of Action" alleges that the petitioner paid money and rendered services *for and on behalf of Elvira A. Davis*, the executrix of the will of Wilbur W. Davis. Obviously, allowance of the petitioner's motion to amend would not have enabled her to recover for any money or services she may have ever paid or rendered for or on behalf of Wilbur W. Davis.

See *Shopneck* v. *Rosenbloom*, 326 Mass. 81, 82.
Turner v. *White*, 329 Mass. 549, 553.

IV. There is No Departure from or Conflict with Decisions of This Court or with Decisions of Other Courts of Appeals.

Intersticially in her petition, the petitioner has introduced the idea that in the case at bar there are grave departures from or conflicts with decisions of this Court and with decisions of other Courts of Appeals. We sincerely believe that such is not the situation and that valid dis-

tinctions are readily discovered and the various decisions easily reconciled.

Conclusion.

On the basis of the foregoing argument it is respectfully submitted that there are no special and important reasons for a review of the case at bar on writ of certiorari and that the petition should therefore be denied.

Respectfully submitted,

ROLAND E. SHAINE,
BROWN, RUDNICK, FREED & GESMER,
85 Devonshire Street,
Boston, Massachusetts,
Attorneys for Respondent.

RICHARD R. CAPLES,
161 Harvard Avenue,
Allston, Massachusetts,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 41.

LENORE FOMAN,
Plaintiff-Petitioner,

v.

ELVIRA A. DAVIS, EXECUTRIX,
Defendant-Respondent.

BRIEF FOR PLAINTIFF-PETITIONER.

Opinions Below.

The December 16, 1960, memorandum opinion of the district court (R. 6-8) is unreported. The opinions of the Court of Appeals (R. 12-15; 20-22) are reported at 292 F. 2d 85.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 26, 1961 (R. 15). A timely petition for rehearing was filed on July 7, 1961 (R. 16-19), and denied on August 17, 1961 (R. 22). A petition for a writ of certiorari was filed with this Court November 14, 1961, and allowed January 8, 1962 (R. 22). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.[1]

1. Is an undesignated motion to vacate judgment which may properly be construed under either of two rules—59(e) or 60(b)—properly construed under that rule (59) which forecloses a disposition of the case on the merits rather than the rule (60) which permits such disposition?

2. After a notice of appeal from judgment is filed and jurisdiction taken by the Court of Appeals, the district court denied a post-judgment motion and the Court of Appeals affirmed this denial. Are these actions by the courts below properly reviewable in this Court?

3. Where a first notice of appeal from judgment is premature and a second notice is filed which refers only to the denial of post-judgment motions, and appellant indicates in a Statement of Points an intention to appeal from the judgment, is that judgment properly before the Court of Appeals?

4. Where a complaint is drawn in accordance with an unreversed decision of the United States Court of Appeals for the First Circuit, does a district judge in that Circuit, after refusing to adhere to the decision and dismissing the complaint for failure to state a claim, abuse his discretion by denying a motion to amend the complaint?

Statutes and Rules Involved.

United States Code, Title 28, § 777 (repealed June 25, 1948, 62 Stat. 992, c. 646, § 39):

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court

[1] Unless otherwise noted, all references to "rule" or "rules" refer to the Federal Rules of Civil Procedure, 28 U.S.C.

of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

United States Code, Title 28, § 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

United States Code, Title 28, § 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Federal Rules of Civil Procedure.

Rule 1:

". . . [These rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 8(f):

"All pleadings shall be so construed as to do substantial justice."

Rule 15(a), (c):

(a) ". . . and leave [to amend] shall be freely given when justice so requires."

(c) "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Rule 54(c):

". . . Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Rule 59(e):

"A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 60(b):

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment."

Rule 61:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 73(b):

"The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. . . ."

Statement of the Case.

On June 14, 1960, plaintiff, a citizen of the State of New York, filed her complaint in this action against the defendant, a citizen of the Commonwealth of Massachusetts, in her legal capacity as executrix under the will of Wilbur W. Davis. In her complaint, filed in the United States District Court for the District of Massachusetts, plaintiff alleged that the matter in controversy exceeded the sum of ten thousand dollars, exclusive of interest and costs, jurisdiction in the district court being based upon diversity of citizenship under 28 U.S.C. § 41(1).

In her complaint (R. 2) plaintiff alleged in a single count an oral agreement with her father, the decedent,

Wilbur W. Davis, whereby the plaintiff agreed to care for her mother, decedent's first wife, and to pay all expenses for her care and maintenance for as long as she lived. The complaint further alleged that the decedent, in turn, agreed to make and leave no will, to the end that the plaintiff, as his only child, would take that portion of his estate to which she would be entitled under the intestacy laws of Massachusetts.

In setting forth her cause of action in a single count based upon the oral agreement, plaintiff relied upon *Cleaves* v. *Kenney*, 63 F. 2d 682 (1st Cir. 1933) (R. 8; Brief for Appellee, pp. 6, ff.; Brief for Appellant, pp. 5, ff.), which held that an oral agreement to destroy a will and codicil and die intestate did not fall under the Massachusetts statute of frauds.

Plaintiff further alleged that she assumed the liability to a sanatorium for the care of the decedent's wife, her mother; that she paid all charges so incurred; and, when it became necessary to move her mother from the sanatorium to her own home, she did so and there continued to care for and provide support, maintenance, medical attendance and nursing for her until the time of her death. Allegedly, these were all the things required of plaintiff under her alleged agreement with the decedent.

Plaintiff further alleged that after the death of decedent's wife he married the defendant, Elvira A. Davis; that thereafter he made a will which, except for a $5,000 legacy to a brother, devised and bequeathed his entire estate to the defendant; and that thereafter he died. Plaintiff, in this action, prayed for judgment in an amount equal to the portion of the decedent's estate which she would have re-

ceived if the decedent had neither made nor left a will as allegedly agreed.

On August 11, 1960, defendant filed her answer and motion to dismiss the complaint on the ground that it failed to state a claim for which relief could be granted. By memorandum of decision dated December 16, 1960, the district judge allowed the motion (R. 6-8), declining to follow the holding in *Cleaves* v. *Kenney, supra;* and judgment dismissing the complaint was entered December 19, 1961 (R. 9).

On December 20, 1960, plaintiff filed motions to vacate the judgment of dismissal and to amend her complaint (R. 9-10). While these motions were pending before the district judge, the plaintiff, apprehensive lest the time allowed for an appeal should expire, filed a notice of appeal on January 17, 1961, from the judgment of dismissal entered on December 19, 1960 (R. 11). On January 23, 1961, the district judge denied plaintiff's motions to vacate judgment and for leave to amend and on January 26, 1961, plaintiff filed a second notice of appeal from the order ~~denying~~ these motions (R. 11).

Upon motion by plaintiff, assented to by defendant, the Court of Appeals on February 24, 1961, ordered the two appeals consolidated. Subsequently, in compliance with Rule 75(d), F.R.C.P., 28 U.S.C. and Rule 24(2) of the Rules of the United States Court of Appeals for the First Circuit, plaintiff furnished to the court and the defendant "a statement of points" upon which she intended to rely on appeal (App. D., Pet. for Cert., p. 37).

In due course the parties filed briefs on appeal with the Court of Appeals, in which were argued the issues whether

the Massachusetts statute of frauds constituted a bar to the action and whether the district judge had committed reversible error in denying plaintiff's motions to vacate the judgment of dismissal and to amend her complaint. In addition, defendant argued that, after the first notice of appeal was filed, the district court was deprived of jurisdiction over the case. *Neither* party, however, argued the issue of the scope of the appeal, which was first raised by the Court of Appeals, *sua sponte*, at the oral argument on appeal.

By judgment entered June 26, 1961 (R. 15), the Court of Appeals ordered judgment dismissing the appeal from the judgment of the district court and affirming the district court's order of January 23, 1961, which denied plaintiff's motions to vacate judgment and to amend her complaint. The court held:

First—Although the motion to vacate judgment could have been filed under either Rule 59(e) or Rule 60(b), in the absence of a designation by the movant "the full context of the rules dictates that resort should be made to the procedure under Rule 59 if time for applying for such motions has not expired."

Second—Since a motion under Rule 59 terminates the running of time for taking an appeal (Rule 73(a)), the notice of appeal filed on January 17, 1960, during the pendency of the motion to vacate, was premature and, presumably, of no effect.

Third—The second notice of appeal, referring only to the order denying the motions to vacate and to amend and not to the original judgment, must therefore, with respect to such judgment, be dismissed.

Fourth—Since the Court of Appeals found "nothing presented by the record to show the circumstances which were before the district court for its consideration" in ruling on plaintiff's motions to vacate judgment and to amend the complaint, the court could not say that the district court had abused its discretion.

On July 7, 1961, plaintiff filed a timely petition for rehearing with the Court of Appeals in which she argued that the second notice of appeal should be treated as appealing from the judgment rather than the order denying the post-judgment motions. Furthermore, plaintiff argued, the ruling of the Court of Appeals was in violation of the basic liberal principles of modern, enlightened practice and procedure in the federal courts. The court denied rehearing (R. 20), saying that "the intent to appeal from the judgment" could not reasonably be inferred from the notice of appeal. "'. . . [P]laintiff's second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal."

Plaintiff filed her petition for a writ of certiorari with this Court on November 14, 1961; and on January 8, 1962, the petition was granted (R. 22).

Summary of Argument.

By way of introduction we attempt to set out the basic principle which underlies every aspect of this appeal, namely that, in the administration of justice in the federal courts today, procedure is subordinate to the ends of substantive justice which, in the present context, means the disposition of cases on their merits. The arguments that follow seek to apply this principle to the instant case.

In Part I, plaintiff argues that, since her undesignated motion to vacate the district court's judgment of dismissal could be construed under either Rule 59 or Rule 60, and construction under the former forecloses a disposition of the case on its merits while construction under the latter permits such disposition, it is the duty of the Court to construe the motion under Rule 60 in order to reach and decide the merits of the case. Courts have time and again treated motions as Rule 60 motions where they were, as here, undesignated and even where they purported to have been made under Rule 59. In other areas, courts have almost uniformly so characterized pleadings and motions as to save the substantive rights of the pleader or moving party and decide the case on its merits rather than on the basis of procedural niceties.

In Part II plaintiff assumes that the motion to vacate judgment is treated by this Court as a Rule 60 motion and explores the implications of such treatment which defendant may seek to raise. Specifically, the defendant has earlier raised the point that, if the motion is treated as a Rule 60 motion, it will not suspend the finality of the judgment for purposes of appeal, and plaintiff's first notice of appeal would have been timely and would have removed jurisdiction of the case to the Court of Appeals. The district court, therefore, the defendant contends, would be without jurisdiction to rule on the pending motion. Plaintiff argues that no such complications arise from a Rule 60 treatment of its motion, for either of two reasons: First, a district court may be said to retain a limited jurisdiction to entertain and deny (as was the case here) a motion pending an appeal; the courts that have faced this specific question have so resolved it and it is a resolution that is sound in principle and responsive to the policies and demands of

appellate procedure. Second, even if this Court should choose not to accept the "limited jurisdiction" approach, yet, as an appellate court, with plenary powers, it can and should, as it has on many occasions, dispose of the entire case, including matters not ruled on below. In the instant case, where a motion was in fact made and in fact ruled on by two courts below, it would be contrary to sound appellate practice to remand the case for rulings which have already been made.

For the purposes of Part III, plaintiff assumes, *arguendo*, that her motion to vacate judgment is properly held to have been a Rule 59 motion and that her first notice of appeal (from the judgment), filed during the pendency of the motion and before the judgment became final, was premature and, presumably, a nullity. In Part III we argue that the second notice of appeal, although referring only to the denial of the post-judgment motions (to vacate judgment and for leave to amend), was sufficient, under the circumstances, to effect an appeal from the judgment itself. These circumstances are that the intention to appeal from the judgment (which seems to be the chief concern of the Court of Appeals) clearly appears from the record as a whole, more particularly from the first notice of appeal and from the plaintiff's Statement of Points to be Relied Upon on Appeal. This Court as well as a great number of Courts of Appeals have reviewed a judgment on appeal although the notice referred only to some post-judgment order. In other cases where no formal notice of appeal was filed at all, the courts found a clear intention to appeal and treated pleadings otherwise designated as the necessary notice of appeal. We submit that in the instant case, there being no prejudice to the defendant and a clear intention to appeal from the judgment of dismissal, the Court of Appeals should have been less concerned with strict in-

terpretation of procedural rules and more with substantive justice, namely, a disposition of the case on its merits.

Part IV deals with the district court's denial, without opinion, of plaintiff's motion to amend the complaint by adding a count in quantum meruit and the affirmance of that denial by the Court of Appeals. We argue first (subpart A) that recovery could properly have been had on the complaint as it stood, since a court is bound to give a party appropriate relief even if other and possibly unavailable relief is all that is prayed for. Specifically, it seems clearly established that recovery may be had on a quantum-meruit basis although the complaint is drawn in terms of money damages for a breach of contract. Assuming, however, that an amendment was necessary or desirable, we next argue (subpart B) that it was an abuse of discretion for the district court, in the circumstances of the instant case, to refuse permission to amend. The complaint had been drawn along breach of contract lines on the basis of an unreversed decision of the Court of Appeals and in reliance that the district court would, as it was bound to do, follow that decision. When the district court chose to depart from the authority of the decision, it should have permitted the plaintiff to amend the complaint to add a count in quantum meruit.

In sum, this entire case is based on the principle stated at the beginning of this Summary. Where a federal court faces a choice between possible alternatives which will determine whether the case is to be decided on its merits or on some procedural technicality, we submit that it is the duty of the court in every instance to choose that alternative which permits a disposition on the merits. The decisions below are contrary to the most significant trend in the growth of the administration of justice in the federal

courts, a trend which began with the advent of the Federal Rules. If permitted to stand, the decisions will constitute a long step backward.

Argument.

Introduction.

Two basic premises constitute the keystone of this entire appeal:

First—Judicial procedure and its various constituent rules are not ends in themselves; they "are but means to an end, means to the enforcement of substantive justice . . ."[2] Procedure, then, in this sense, is subordinate to the ends of substantive justice—"a handmaid rather than mistress."[3]

Second—The constituent of substantive justice which concerns us here is that cases shall be decided "*on their merits* as *expeditiously* as possible."[4]

Throughout this brief we refer again and again to these premises—these "basic principles" which give meaning to the specific rules of federal procedure. Perhaps it would be proper to ask this Court's indulgence for such monotonous repetition. But the courts below, by their disregard of basics in rendering their decisions, by their foreclosing a hearing on the merits on the ground of procedural niceties

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[2] Charles E. Clark, "Fundamental Changes Effected by the New Federal Rules I," 15 Tenn. L. Rev. 551 (1939).

[3] *In re Coles* [1907], 1 K.B. 1, 4, per Collins, M.R.

[4] Holtzoff, "A Judge Looks at the Rules After Fifteen Years of Use," 15 F.R.D. 155 (1954). (Emphasis supplied.) See also Address of Chief Justice Hughes, 21 A.B.A.J. 340 (1935).

where a hearing on the merits was clearly possible with little, if any, judicial strain, have made it imperative that we state and restate our reliance on the basic principles of federal procedure.

This Court has itself recently articulated the principles upon which we rely:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957).

Plaintiff respectfuly submits that the courts below have not shown a proper regard for these basic precepts of federal procedure, and their decisions must be reversed by this Court.

I. An undesignated motion to vacate judgment which may properly be construed under either of two rules— 59(e) or 60(b)— should be construed under that rule which results in permitting a disposition of the case on the merits rather than the rule which forecloses such disposition.

Recognizing that plaintiff's motion to vacate the judgment of dismissal could have been filed under either Rule 59(e) or Rule 60(b) (R. 14), and realizing, as it must, that plaintiff was not bound to cite the particular rule relied upon,[5] and noting that, if construed under Rule 59, the

[5] Rule 7(b), which deals with the form of motions, does not require reference to a particular rule under which a motion is made.

appeal from the judgment below would not properly be before the court (as it would be if the motion were construed under Rule 60) (R. 14), yet the Court of Appeals decided that "the full context of the rules" dictated that the motion should be held to have been made under Rule 59.

The full context of the rules, we submit, requires that, in construing pleadings, courts shall disregard harmless error (Rule 61; 28 U.S.C. § 2111), and that pleadings shall be construed "to secure the just, speedy, and inexpensive determination of every action" (Rule 1) and so "as to do substantial justice" (Rule 8(f)). The decision of the Court of Appeals, resulting as it does in a dismissal of the action purely on matters of pleading and without reaching the substance of plaintiff's grievance, disregards, we submit, the purpose of pleading as articulated by this Court — "to facilitate a proper decision on the merits." *Conley* v. *Gibson, supra.*

In order to reach the merits, the Court of Appeals should have characterized plaintiff's undesignated motion to vacate judgment under whatever applicable rule would have yielded that desirable result, be it Rule 59, Rule 60, or some other rule. But this larger and more significant principle escapes the Court of Appeals; rather, by framing the issue narrowly it rests its holding, in part, on its inability "to find any case which construed a motion to vacate a judgment made within 10 days of the judgment as a Rule 60(b) motion so that an appeal taken before a disposition of the motion would be timely" (R. 14-15). But other Courts of Appeals, in harmony with the principle expressed by this Court in the *Conley* case, and with awareness of the alternative results of characterizing a pleading one way or another, have uniformly ruled in favor of a characterization which permits a decision on the merits.

Thus Judge Frank in the Second Circuit held that a motion for a new trial[6] should have been treated as a Rule 60(b) motion, thus rendering timely the plaintiff's appeal from the denial of the motion. *Tarkington* v. *United States Lines Co.*, 222 F. 2d 358 (1955).[7] Judge Clark of the same Circuit has said that defendant's motions to serve supplemental pleadings and to reargue plaintiff's motion for summary judgment earlier granted might, "in the interest of justice," be treated as a Rule 60(b) motion if any of the grounds in that rule were met. *United States* v. *Wissahickon Tool Works, Inc.*, 200 F. 2d 936, 938 (1952). Other courts have treated variously designated pleadings as if they were motions under Rule 60(b). Thus the Third Circuit has deemed a letter to the district court to be a motion under 60(b), *United States* v. *Backofen*, 176 F. 2d 263 (1949); the Sixth Circuit has treated an independent action as a 60(b) motion, *Sebastiano* v. *United States*, 103 F. Supp. 278, *aff'd*, 195 F. 2d 184 (1952); the Seventh Circuit has considered a petition for "review and rehearing" as a Rule 60(b) motion, *In re Marachowsky-Stores Co.*, 188 F. 2d 686 (1951); and a district court in the Ninth Circuit has treated a petition for a writ of coram nobis as a 60(b) motion. *In re Estate of Cremidas*, 14 F.R.D. 15 (D. Alaska, 1953).

And when it serves the end of deciding cases on their merits, courts will *reject* the Rule 60 characterization. In *Southern States Equipment Corp.* v. *USCO Power Equipment Corp.*, 209 F. 2d 111 (5th Cir. 1953), appellant

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[6] Rule 59 is captioned: "New Trials . . ."

[7] The motion for a new trial was filed twenty-one days after judgment; the notice of appeal was filed sixty-four days after judgment, but within the thirty-day appeal period after order denying the motion. See also *Sternstein* v. *"Italia,"* 275 F. 2d 502 (2d Cir. 1960).

filed a motion expressly purporting to be under Rule 60(a), requesting the court to correct a "clerical error in the judgment." This error was corrected and the judgment ordered re-entered as corrected. Within thirty days of the second entry of judgment, but more than thirty days after the first, appellees filed notice of appeal from certain portions of the corrected judgment adverse to them. Appellant contended that, since a Rule 60 motion does not toll the running of time for appealing, appellees' notice, coming more than thirty days after original entry of the judgment appealed from, was untimely and the appeal should be dismissed. The court's disposition of the issue thus presented indicates, we submit, the proper approach in the instant case:

> "Without dealing with the various ramifications and procedural complexities of the problem at length and considering it only in light of requirement of Rule 8(f), F.R.C.P., that 'all pleadings shall be so construed as to do substantial justice', we hold that appellant's motion filed June 19, 1952, while purporting to be a motion under Rule 60(a), will for present purposes be treated as a motion to alter or amend the judgment under Rule 59(e), and that appellant's motion to dismiss the cross-appeal is denied." 209 F. 2d at 116-117.[8]

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[8] See also *Hadden* v. *Ramsey Products, Inc.*, 196 F. 2d 92 (2d Cir. 1952), where the court had before it certain petitions attacking a final judgment, it apparently viewing these petitions as permitted under Rule 60(b). These petitions, the court said, "may be treated as an independent action to obtain equitable relief" from the judgment; and this, notwithstanding that "Rule 3 states that an action is commenced by filing a complaint" and that Rule 4 contemplates that a summons shall be issued and served. The court noted that, despite technical requirements not having been met, "it would be quite out of harmony with the spirit of Rule 1 to hold the appellees bound by the labels placed on the papers submitted to the district court." 196 F. 2d at 95.

The basic principles in favor of liberality and against hypertechnicality, the recognition and effectuation of the primary purpose of pleadings as articulated by this Court in *Conley, supra,* are evident in cases involving matters other than the two particular rules involved in the instant case. In order to achieve substantive justice, the courts have again and again disregarded labels and so characterized pleadings and motions as to permit a disposition of cases on their merits. Thus a petition for rehearing has been held equivalent to a motion for a new trial. *Fraser* v. *Doing,* 130 F. 2d 617 (D.C. Cir. 1942). *The Astorian,* 57 F. 2d 85, 87 (9th Cir. 1932). An acknowledgment of service of notice of appeal by the appellee, when filed, has been held an acceptable substitute for a regular notice of appeal which was not timely filed with the court. *Crump* v. *Hill,* 104 F. 2d 36 (5th Cir. 1939). In *Jordan* v. *United States District Court,* 233 F. 2d 362, 365 (D.C. Cir. 1956), a petition for a writ of mandamus filed with the appellate court was accepted as a sufficient notice of appeal. And an application made in the appellate court for leave to appeal in forma pauperis has been held "an unequivocal notification of intention to appeal" and sufficient to give the court jurisdiction. *Blunt* v. *United States,* 244 F. 2d 355, 359 (D.C. Cir. 1957). *Burdix* v. *United States,* 231 F. 2d 893, 894 (9th Cir. 1956). *Roth* v. *Bird,* 239 F. 2d 257 (5th Cir. 1956). In *United States* v. *Caruso,* 272 F. 2d 799 (3d Cir. 1959), a pleading captioned "Exceptions to Order for Distribution" was treated as equivalent to a motion under Rule 59(e). And, finally, a motion for summary judgment (Rule 56(b)) was treated as a motion to dismiss the complaint for failure to state a claim upon which relief can be granted (Rule 12(c), mentioned by the court). *Dunn* v. *J. P. Stevens & Co.,* 192 F. 2d 854 (2d Cir. 1951).[9]

[9] It is interesting to note that this treatment of a pleading as something other than what it is labelled is carried into the Judicial

The citation (R. 14) by the Court of Appeals of *Chicago & N.W. Ry. Co.* v. *Davenport*, 95 F. Supp. 469 (S.D. Iowa 1951) as criticized by Professor Moore is eloquent of the court's discounting the basic principles of federal procedure in favor of the technical distinctions. In that case the defendant's motion to dismiss the action on the ground of improper venue was granted and the case dismissed on November 27, 1950. Within ten days plaintiff moved to vacate the dismissal and to have the action transferred to the proper district, and, relying on Rule 60(b)(6), the district court granted the motion. The criticism of this reliance on Rule 60, 7 Moore, Federal Practice, ¶ 60.27 [2], p. 306, n. 23 (2d ed. 1955), is that it was unnecessary, since the motion had been made within the ten-day period and relief could have been granted under Rule 59(e). But it did not make any difference under which rule the motion was construed; the issue was one of purely academic interest. The instant case is vastly different!

It is interesting to note that the court in the *Davenport* case showed concern with the basic principles which we are here espousing when it stated:

> "It is the opinion of the court that it is in the interest of justice and will promote the just, speedy and inexpensive determination of the question involved to grant the relief asked by vacating the order of dismissal . . ." 95 F. Supp. at 472.

We submit that the reliance of the Court of Appeals on the criticism of a moot point in *Davenport* is entirely misplaced

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Code. Section 2103 of Title 28, U.S.C. provides that this Court shall regard and act upon an appeal from a state court improvidently taken as a petition for a writ of certiorari.

in this case, for here that point, the 59-60 distinction, is of decisive significance. More appropriately, the court should have taken note of the above-quoted statement of principle from *Davenport* and applied it in deciding this case.

Finally, it is interesting to note defendant's view of plaintiff's motion to vacate (although it is expressed for her own purposes on appeal):

> "In general, motions to vacate judgment in the District Court are governed by Rule 60 of the Federal Rules of Civil Procedure, and, although the appellant does not say so explicitly, it is apparent from her brief . . . that in the matter of her motion to vacate judgment she was relying on the 'other reason' clause in paragraph (b) of Rule 60." Brief for Appellee, p. 10.

II. THE DISTRICT COURT'S DENIAL OF PLAINTIFF'S MOTION TO VACATE JUDGMENT (AND THE AFFIRMANCE THEREOF BY THE COURT OF APPEALS) IS PROPERLY SUBJECT TO REVIEW BY THIS COURT NOTWITHSTANDING THE FACT THAT SUCH DENIAL WAS MADE AFTER AN APPEAL HAD BEEN PERFECTED, EITHER ON THE GROUND—

(1) THAT THE DISTRICT COURT RETAINED LIMITED JURISDICTION TO CONSIDER AND DENY THE MOTION AND SUCH ACTION IS THEREFORE REVIEWABLE ON APPEAL, OR

(2) THAT THIS COURT OUGHT TO DISPOSE COMPLETELY OF ALL ASPECTS OF THE CASE IN THE SOUND EXERCISE OF ITS PLENARY APPELLATE JURISDICTION.

(1)

The defendant may contend, as she has earlier, that if plaintiff's motion to vacate the judgment of dismissal is

treated as a Rule 60(b) motion, "the District Court would have been deprived of jurisdiction to entertain" such motion, since the first notice of appeal would have given the Court of Appeals jurisdiction over the case. See Br. in Opp. to Pet., pp. 4-5. The implication which defendant seeks to draw from this assertion is unclear. A case cited by the defendant, *Daniels* v. *Goldberg*, 8 F.R.D. 580 (S.D. N.Y.), *aff'd on other grounds*, 173 F. 2d 911 (2d Cir. 1949), makes the point that Rule 60 does not "confer on a district court the power to *vacate* a judgment after an appeal has been filed." (Emphasis supplied.) If this is the contention of the defendant, *i.e.*, that the district court is without jurisdiction after a notice of appeal has been filed and served to *grant* a motion to vacate judgment, then we find ourselves in agreement. If her contention, however, is that the district court is without jurisdiction to entertain and *deny* the motion and that its action in doing so in the instant case cannot now be reviewed by this Court, we submit that such position is without merit in principle and is contrary to the authorities that have considered the specific question.

This specific question, whether a district court retains a limited jurisdiction to consider and deny a post-judgment motion pending appeal, has been answered in the affirmative by the courts in which the question has come up. In *Ferrell* v. *Trailmobile, Inc.*, 223 F. 2d 697 (5th Cir. 1955), the court noted that, when a Rule 60(b) motion is filed pending appeal, "the district court retains jurisdiction to consider and deny such motions, but that, if it indicates that it will grant the motion, the appellant should then make a motion in the Court of Appeals for a remand of the case in order that the district court may grant such motion." 223 F. 2d at 699. This limited jurisdiction approach

has been followed as well by the District of Columbia Circuit,[10] the Seventh Circuit,[11] and the Ninth Circuit.[12]

The "limited jurisdiction" approach affords an effective compromise between two competing policies in the area of judicial and appellate administration: One, that only one court shall have jurisdiction over a case at any one time, and the other, that the case shall be fully developed in the trial court before the record reaches the appellate tribunal. There is, by this approach, eliminated needless remanding to lower courts for rulings on motions which such courts could well have considered without interfering with the jurisdiction of the appellate court. The advantages of the "limited jurisdiction" approach are well stated in a note, "Disposition of Federal Rule 60(b) Motions During Appeal," in 65 Yale Law Journal 708 (1956).

(2)

This Court need not, however, accept the "limited jurisdiction" approach in order to make a complete disposition of this case, including review of the district court's denial of plaintiff's motions and the affirmance by the Court of Appeals of such denial. This Court has on several occasions resorted to its plenary appellate jurisdiction to rule on matters not considered below and not argued to the Court. In *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 567-568 (1931), this Court chose to review all these matters, stating:

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[10] *Smith* v. *Pollin*, 194 F. 2d 349 (1952).

[11] *Binks Mfg. Co.* v. *Ransburg Electro-Coating Corp.*, 281 F. 2d 252, 260-261 (1960).

[12] *Grecar* v. *Grecar*, 288 F. 2d 466 (1961). See also *Perlman* v. *322 West Seventy-Second Street Co.*, 127 F. 2d 716, 719, text at n. 2 (2d Cir. 1942); *Herring* v. *Kennedy-Herring Hardware Co.*, 261 F. 2d 202, 203-204 (6th Cir. 1958).

> "The entire record, however, is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have made of it upon the appeal from the district court."

The Court has ruled similarly in other cases on matters not specifically before it for one reason or another.[13]

Thus, even if it is held that the district court was without jurisdiction to entertain and deny plaintiff's motion to vacate judgment, and even if this is held to have deprived the Court of Appeals of jurisdiction to rule on the denial, yet as a fact such motion was filed and ruled on by both courts below, and it lies well within the proper exercise of its plenary appellate jurisdiction for this Court to consider and rule on issues raised by the denial of the motion, especially where such exercise would avoid prolonged and circuitous proceedings.[14]

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[13] *Conley* v. *Gibson*, 355 U.S. 41, 45 (1957): "Although the District Court did not pass on the other reasons advanced for dismissal of the complaint we think it timely and proper for us to consider them here."; *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Cole* v. *Ralph*, 252 U.S. 286, 290 (1920): "In the circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better . . ."; *Watts, Watts & Co., Ltd.*, v. *Unione Austriaca Di Navigazione*, 248 U.S. 9, 21 (1918); *Lamar* v. *United States*, 241 U.S. 103, 110-111 (1916); *Delk* v. *St. Louis & San Francisco Railroad Co.*, 220 U.S. 580, 588-590 (1911); *Boston & Maine Railroad* v. *Gokey*, 210 U.S. 155, 162 (1908).

[14] The appellate court faced the problem of ruling on decisions made below on questions not properly before the court because of the state of the pleadings in *A. L. Mechling Barge Line* v. *Bassett*, 119 F. 2d 995 (7th Cir. 1941). The court, noting the situation, de-

III. WHERE A FIRST NOTICE OF APPEAL FROM A JUDGMENT IS PREMATURE, A SECOND NOTICE REFERRING ONLY TO THE DENIAL OF A POST-JUDGMENT MOTION IS SUFFICIENT, UNDER THE CIRCUMSTANCES, TO EFFECT A VALID APPEAL FROM THE JUDGMENT.

(For the purposes of this argument we assume, *arguendo*, that plaintiff's motion to vacate was properly held to have been a Rule 59 motion. As such, it was not appealable, *i.e.*, it was subject to review only on the issue of abuse of discretion. See 6 Moore, Federal Practice, par. 59.15, pp. 3890 ff. (2d ed. 1955).)

In dismissing plaintiff's appeal from the district court's judgment dismissing the action the Court of Appeals held that, since plaintiff's second notice of appeal (R. 11) did not refer to the judgment, but rather to the denial of the post-judgment motions, such notice was insufficient to bring the judgment before the court on review. This holding is in conflict with the decisions of this Court and represents a significant departure from a line of cases in the various Courts of Appeals.

In *United States* v. *Ellicott*, 223 U.S. 524, 538 (1912), this Court held that a notice of appeal referring to "the judgment rendered in the above entitled cause on the fourth day of January, 1909," which was the date of the order denying a motion for a new trial, was sufficient to raise on appeal the final judgment which had been entered May 18, 1908. In *Hoiness* v. *United States*, 335 U.S. 297 (1948), this Court reversed a dismissal of appeal below

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cided to consider the case on its merits, stating: "it is difficult to see how either party would benefit by a reversal which would require the lower court to decide questions which, as pointed out, it apparently has decided." 119 F. 2d at 997.

which was based on a claimed deficiency in the notice of appeal. The only appealable order was the judgment of dismissal; the later order—the one specified in the notice of appeal—was not appealable. This Court held "that defect was of such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress in R. S. § 954, 28 U. S. C. (1946 ed.) § 777." *Id.* at 300 [15] See also *United States* v. *Arizona*, 346 U.S. 907 (1953), and *State Farm Mutual Automobile Insurance Co.* v. *Palmer*, 350 U.S. 944 (1956), where this Court in both instances granted certiorari and reversed, per curiam, dismissals of appeals below which were grounded on faulty notices of appeal.

Similar situations involving the effect of a faulty notice of appeal have arisen in cases decided in almost every federal judicial circuit, including the First Circuit. In each of these cases a notice of appeal was held sufficient to raise the final judgment on appeal although defective in that it referred, not to the judgment, but to some other, non-appealable order.

In *Nolan* v. *Bailey*, 254 F. 2d 638, 639 (7th Cir. 1958), the notice of appeal was "from the order directing the

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[15] The repeal of section 777 does not affect the applicability of *Hoiness* to the instant case. The legislative history of the repealing Act expressly states that the reason for the repeal was that the subject matter of section 777 was "covered by Rules 1, 15, and 61 of the Federal Rules of Civil Procedure." H. Rep. No. 308, 8th Cong., 1st Sess., p. A 239. After referring to the repeal in *Hoiness*, this Court said: "And see Rules 1, 15, 61 and 81 . . ." 335 U.S. at 300-301, n. 6. See also 28 U.S.C.A., Rule 61, Notes of Advisory Committee on Rules. Furthermore, 28 U.S.C. § 2111, in language similar to that of Rule 61, directs appellate courts to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

jury to return a verdict against the plaintiffs." The notice of appeal in *Railway Express Agency, Inc.*, v. *Epperson*, 240 F. 2d 189, 192 (8th Cir. 1957), was "from the order overruling defendant's Motion for Judgment or in the Alternative for New Trial . . ." In *Creedon* v. *Loring*, 249 F. 2d 714 (1st Cir. 1957), and *United States* v. *Best*, 212 F. 2d 743, 744-745, n. (1st Cir. 1954), Judge Magruder of the First Circuit did not permit faulty notices of appeal to prejudice appellant's right to have the judgment below reviewed. In *Best* the notice was "from the order denying the motion for rehearing," while in *Creedon* it was "from order denying plaintiff's motion for new trial." In denying appellee's motion to dismiss the appeal because of this faulty notice in *Creedon*, Judge Magruder said: "It is founded on pure technicality." [16]

In its petition for rehearing, plaintiff called this line of cases to the attention of the Court of Appeals. In denying rehearing the court attempted to distinguish the cases, saying that "the second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal" (R. 21). But clearly such a narrow and qualified statement of the issue in an attempt to distinguish cases that are, in principle, indistinguishable is error. Whether the intent to appeal is garnered from one notice or another, or, for that matter, from any pleading before the court, is, we submit, immaterial. What is

[16] See also *Sobel* v. *Diatz*, 189 F. 2d 26, 27 (D.C. Cir. 1951); *Conway* v. *Pennsylvania Greyhound Lines, Inc.*, 243 F. 2d 39, 40, n. 2 (D.C. Cir. 1957); *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 65, 68 (3d Cir. 1958); *United States* v. *Stromberg*, 227 F. 2d 903, 904 (5th Cir. 1955); *Holz* v. *Smullon*, 277 F. 2d 58, 61 (7th Cir. 1960); and *Cheney* v. *Moler*, 285 F. 2d 116, 117-118 (10th Cir. 1960). And see *Gunther* v. *E. I. DuPont DeNemours & Co.*, 255 F. 2d 710, 717 (4th Cir. 1958); and *Trivette* v. *N.Y.L.I.C.*, 270 F. 2d 198 (6th Cir. 1959).

significant is that the intent to appeal from the judgment of dismissal is, in fact, manifested to the appellate court by the actions taken and papers filed by the plaintiff.

In the *Hoiness* case, *supra*, this Court said:

> "It seems to us hypertechnical to say that the *appeal papers* did not bring the sole issue of the case fairly before the Court of Appeals." 335 U.S. at 301. (Emphasis supplied.)

The court in *Atlantic Coast Line R. Co.* v. *Mims*, 199 F. 2d 582, 583 (5th Cir. 1952), said:

> "While we agree with appellees that an appeal will not lie from an order overruling a motion for new trial, we agree with appellant that, though the order appealed from was misnamed, it clearly enough appears *from the record as a whole* that the intent was to appeal from the judgment, and that that intent should be given effect." (Emphasis supplied.)

The court in *United States* v. *Stromberg*, *supra*, n. 16, refused to dismiss an appeal although the notice referred only to denial of appellant's motions under Rules 52(b) and 59(a), saying that, "where it is obvious that the *overriding intent* was effectively to appeal, we are justified in treating the appeal as from the final judgment." 227 F. 2d at 904. (Emphasis supplied.)

Other courts have looked beyond the four corners of a faulty notice of appeal into the record of the case in determining the proper scope of appeal. In *Sun-Lite Awning Corp.* v. *E. J. Conklin Aviation Corp.*, 176 F. 2d 344 (4th Cir. 1949), the court found an intent to appeal from the final judgment (despite a notice of appeal which referred only to denial of a motion for rehearing) by examining the

Statement of Points to be Relied Upon on Appeal as filed by appellant. In *DiGiovanni* v. *DiGiovannantonio*, 233 F. 2d 26 (D.C. Cir. 1956); the court took notice of the designation of the record on appeal in determining the scope of the appeal. And, as stated by the court in *Blitzstein* v. *Ford Motor Co.*, 288 F. 2d 738, 740 (5th Cir. 1961):

> "In overruling appellee's objections we reaffirm our view that in determining whether Rule 73(b) has been complied with, we may look to the statement of points and designation of contents of record on appeal."

In other cases Courts of Appeals have taken jurisdiction of appeals where no formal notice was filed as required by Rule 73. In *Crump* v. *Hill*, 104 F. 2d 36 (5th Cir. 1939), the appellant filed appellee's acknowledgment of service of notice of appeal, her entry of appearance and the designation of the record on appeal, but failed to file a timely notice of appeal. Appellee accordingly moved to dismiss the appeal. In denying the motion the court held that appellant's actions were in complete accordance with the spirit of the rules and in substantial compliance with their letter. Chief Judge Hutcheson stated:

> "* * * [I]t would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule [73] is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights. * * * Indeed, it would we think be an exhibition of unsound reasoning and a clear abuse of judicial discretion for us to start the Rule off barnacled with the rigid and rigorous holding appellee's motion seeks." 104 F. 2d at 38.

See also *Jordan* v. *United States District Court*, 233 F. 2d 362 (D.C. Cir. 1956), where a petition for a writ of mandamus filed with the appellate court was accepted as a sufficient notice of appeal, and *Blunt* v. *United States*, 244 F. 2d 355 (D.C. Cir. 1957), where an application made in the appellate court for leave to appeal in forma pauperis was held "an unequivocal notification of intention to appeal" and sufficient to confer appellate jurisdiction. See also *Burdix* v. *United States*, 231 F. 2d 893 (9th Cir. 1956), and *Rotl* v. *Bird*, 239 F. 2d 257 (5th Cir. 1956).

Applying the precedents to the instant case, there can be no doubt that the intention to appeal from the district court's dismissal of the action is manifest from the record in the case. Indeed, this case is a stronger one on this issue of intention than some of those cited, since here plaintiff filed a notice of appeal (her first notice) specifically referring to the judgment of the district court dismissing the action. That such notice is held, whether correctly or erroneously, to have been nugatory because of premature filing does not detract from its force as a clear manifestation of plaintiff's intention to appeal from the judgment. The "appeal papers," the "record as a whole" and, indeed, the Statement of Points to be Relied Upon on Appeal (Pet. for Cert., App. D, p. 37) are eloquent of an overriding intention which the Court of Appeals disregards. In viewing the second notice of appeal *in vacuo*, as it were, the court has rendered a decision based upon a hypertechnical view of federal procedural requirements, in conflict with the decisions both of this Court and those of federal judicial circuits, and, in the words of Chief Judge Hutcheson, a decision "harking back to the formalistic rigorism of an earlier and outmoded time" and constituting "a travesty upon justice."

Finally, it would be well to note that in no wise has the defendant been misled or prejudiced by plaintiff's actions in appealing this case. Nowhere in her brief before the Court of Appeals does the defendant even raise the issue whether the judgment of the district court is properly before the Court of Appeals. And, if that Court felt compelled to resolve the issue by reference to strict and technical doctrines of appellate jurisdiction, it has relied on a concept which is out of place in the context of the instant case. "The rule of strict construction does not apply to the acquiring of jurisdiction by an appellate court. On the contrary, the steps taken for an appeal are to be liberally construed as appears from the cases cited * * *" *Cutting v. Bullerdick*, 178 F. 2d 774, 776 (9th Cir. 1949).

IV. The district court's dismissal of the complaint and its denial of plaintiff's motion to amend her complaint constitute reversible error.

In affirming the orders of the district court entered on January 23, 1961,[17] denying plaintiff's motions to vacate the judgment dismissing her complaint and to amend her complaint, the Court of Appeals has, in effect, held (1) that the proffered amendment set forth a new cause of action, "an independent matter" which was not set out in the original complaint (R. 21), and (2) that the district judge's denial of plaintiff's motion to amend her complaint did not constitute an abuse of discretion. Both holdings, we submit, are in conflict with the decisions of this Court and those of a number of Courts of Appeals, as well as in violation of the basic principles of federal procedure as

[17] The Court of Appeals erroneously refers in its mandate to the district court's orders entered January 26, the date of plaintiff's second notice of appeal.

articulated in the cases and the Federal Rules of Civil Procedure.

It would be well at this point to focus upon the facts pertinent to this aspect of the case. The complaint alleges an agreement whereunder plaintiff was to provide for the care of her mother and was to receive, in turn, upon the death of her father, her intestate share of his estate. (At his death this turned out to be two-thirds of approximately $60,000.) Plaintiff further alleges full performance of her part of the agreement by furnishing and paying for the care of her mother (Complaint, par. 3, R. 3), and prays for judgment in the amount of $40,000.

The proffered amendment to the complaint (R. 10) repeats the first paragraph of the original complaint (R. 2), claims a jury trial, and prays for judgment in the amount of $12,500, representing "monies paid by the plaintiff for and on behalf of the defendant, and for services rendered for and on behalf of the defendant . . ."[18] (R. 10).

Thus the only new matter contained in the amendment is a specification of the dollar amount claimed to be owed plaintiff for her services and expenditures and a prayer for judgment in that amount and for jury trial. Obviously, all the amendment sought to accomplish was the addition of a count in quantum meruit to what had been

[18] References to "defendant" are clearly intended to read "decedent." The defendant, who is being sued solely in her representative capacity (the case being actually entitled "Lenore Foman v. The Goods, Effects and Credits of Wilbur W. Davis, deceased, now in the hands of Elvira A. Davis, Executrix u/w of said Wilbur W. Davis"), obviously has no standing in the action save in such representative capacity. Although defendant bases an argument upon this obvious slip (Brief for Defendant, pp. 12-13), the Court of Appeals did not refer to it as a ground for its holding and, apparently, took this minor discrepancy for what it was.

a straight action for damages for breach of contract. To hold that damages based on quantum meruit cannot be obtained in an action for breach of contract, to deny permission to add such a count to the complaint, and to base these rulings on the characterization of the quantum meruit count as a new action or "independent matter" is manifest error. Plaintiff argues, *first*, that the quantum meruit count could properly have been recovered upon under the original complaint and that an amendment was therefore not necessary; and, *second*, that, if amendment is necessary or desirable, a refusal to grant leave to amend constitutes an abuse of judicial discretion.

A. The complaint seeking damages for breach of contract should not have been dismissed for failure to state a claim, since it contains an adequate basis for a quantum meruit recovery.

In *Friederichsen* v. *Renard*, 247 U.S. 207 (1918), the plaintiff, claiming to have been defrauded in an exchange of lands, brought suit in the district court to annul the contract and deed and for incidental damages. The court, finding that plaintiff had affirmed the contract by acts of ownership, transferred the case to the law side as an action for damages for deceit. The bill was appropriately amended to conform to a law action, adding a prayer for a judgment in damages, but effecting no substantial change in the allegations of fraud. Meanwhile the statute of limitations had run and, on this ground, the district court ordered a directed verdict in favor of the defendants. The Court of Appeals for the Eighth Circuit affirmed on the ground that the amended complaint set forth "a new action at law, directly opposed to the theory stated in the bill," and therefore the amended complaint did not relate back to the commencement of the action. 231 Fed. 882, 885.

This Court granted certiorari and reversed the decisions below, stating that it considered it settled—

> ". . . . that the conversion of a suit in equity into an action at law or *vice versa* is not alone sufficient to constitute the beginning of a new action and that with respect to the statute of limitations it is a mere incident in the progress of the original case." 247 U.S. at 210.

But more in point and particularly apropos to the instant case is the following from 247 U.S. at 210:

> "But the allegations of fraud in the two papers are the same in substance, and practically the same in form, the only substantial difference between them being that the prayer for relief in the bill is for mutual return of lands, with incidental damages, while, in the amended petition, it is for damages alone. *The cause of action is the wrong done, not the measure of compensation for it, or the character of the relief sought, and, considered as a matter of substance, the change in the statement of that wrong in the amended petition cannot in any just sense be considered a new or different cause of action.*" (Emphasis supplied.)

One of the grounds relied upon by the Court of Appeals in the instant case in characterizing the quantum meruit count as "an independent matter" from the original claim for damages for breach of contract is that it proceeded "upon a different theory" (R. 21). This was one of the grounds relied upon by the Court of Appeals in *Friederichsen, supra,* and the reversal of that case by this Court is eloquent of the invalidity of the "different theory" test. This is confirmed by *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68 (1933), where this Court, by Mr.

Justice Cardozo, held that a change in legal theory was no longer accepted as the test in determining whether a claim is a new action or whether it constitutes part of a pending action.

In *Hutches* v. *Renfroe*, 200 F. 2d 337, 341 (5th Cir. 1952), the court held that, where the facts alleged in a complaint entitle the plaintiff to certain relief, but such relief is not clearly prayed for, "it is the duty of the court to grant the relief to which the plaintiff is entitled, irrespective of the prayer for relief." And even where a defective theory of relief is pursued in the complaint, the court was "in no doubt that plaintiff is entitled to the relief to which the proven facts entitle him, even though his own legal theory of relief may have been unsound." 200 F. 2d at 340.

The Federal Rules of Civil Procedure require the same result. Rule 54(c) provides, in part:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Finally, it is anomalous to note that the holding of the Court of Appeals that a count in quantum meruit is "an independent matter" from an action for breach of contract is stricter and more technical than required even by the old rules of common-law pleading under the forms of action. Thus in *Parker* v. *Macomber*, 17 R.I. 674, 24 Atl. 464, 16 L.R.A. 858 (1892), a case somewhat similar on its facts to the instant case, it was held that a declaration in an action of assumpsit not containing a count in quantum meruit was nevertheless sufficient as a basis for

recovering the value of services performed by the plaintiff pursuant to a contract although damages for breach could not, as such, be recovered under the facts of the case. See also *Norris* v. *School District in Windsor*, 12 Me. 293, 298 (1835). In 1 Chitty on Pleading, 353* (16th Am. ed. 1876), it appears:

> "Under an *indebitatus* count the plaintiff may recover what may be due him, although no specific price or sum was agreed upon; and therefore it has been observed that the *quantum meruit* and *quantum valebant* counts are in no case necessary . . ."

This Court has recently stated the "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). The complaint in the instant case alleged a set of facts sufficient to support recovery on a quantum meruit basis, and the courts below erred, therefore, in dismissing it on the ground that it failed to state a claim.

B. A complaint seeking damages for breach of contract and drawn in accordance with an unreversed decision of the United States Court of Appeals for the First Circuit was dismissed as failing to state a claim by a district judge in that Circuit who refused to adhere to the decision; his subsequent denial of plaintiff's motion to amend the complaint by adding a count in quantum meruit constitutes a clear abuse of judicial discretion.

Even assuming that the complaint should have been amended, the denial of permission to amend constitutes abuse of discretion. Rule 15(a) requires that leave

to amend "be freely given when justice so requires." Again and again the various Courts of Appeals have made it clear that Rule 15(a) imposes a *duty* on the courts to allow a litigant to have his day in court by permitting him to correct a pleading in some respect deficient. Thus in *Dowdy* v. *Procter & Gamble Mfg. Co.*, 267 F. 2d 827 (5th Cir. 1959), Chief Judge Hutcheson said, assuming that the complaint failed to state a claim, yet the district judge was in error for dismissing the complaint without granting leave to amend. See also *Pioche Mines Consol., Inc.*, v. *Fidelity-Philadelphia Trust Co.*, 206 F. 2d 336 (9th Cir. 1953): "In view of the liberal spirit as regards amendments displayed in Rule 15 F.R.C.P., we think Pioche should have been given opportunity by amendment to cure if it could the shortcomings of the counterclaim indicated by the judge." *Id.* at 337. See also *Dunn* v. *J. P. Stevens & Co.*, 192 F. 2d 854, 856 (2d Cir. 1951). *Peterson Steels, Inc.*, v. *Simon*, 188 F. 2d 193, 196 (7th Cir. 1951).

In *Blake* v. *Clyde Porcelain Steel Corp.*, 7 F.R.D. 768 (D.C. S.D. N.Y. 1944), plaintiff filed a motion to amend his complaint, which made claim for moneys due but not paid under an employment contract. The proposed amendment, as in the instant case, sought to add a count in quantum meruit. In permitting amendment the district judge said: "Rule 15(a) states that 'leave' to amend 'shall be freely given when justice so requires', and if plaintiff has a valid cause of action upon any theory, he should be afforded opportunity to assert it." 7 F.R.D. at 769.

Cases involving alternative theories of recovery other than the contract-quantum meruit distinction of the instant case have recognized the duty of the district courts to permit amendment where, on the facts stated, plaintiff has a valid cause of action upon a theory not asserted in his

complaint. In *United States* v. *Frank B. Killian Co.*, 269 F. 2d 491 (6th Cir. 1959); an "ambiguous and poorly drawn" complaint, alleging a contract between the parties, stated: "This is a suit of a civil nature . . . under the Royalty Adjustment Act of 1942 . . ." In fact no such cause of action is provided for under that Act and, on that ground, the district court granted defendant's motion to dismiss the action. The Court of Appeals, citing Rules 8(f) and 54(c) and this Court's decision in *Conley* v. *Gibson*, noted that, since the pleading did mention the contract, which was the only basis for recovery, a dismissal of the poorly drafted pleading with leave to amend would have been unassailable; but, since no such leave was granted, the plaintiff should be permitted to file an amended complaint in conformity with Rule 8 and to proceed with the prosecution of the action on the basis of the contract.

McIntyre v. *Kansas City Coca Cola Bottling Co.*, 85 F. Supp. 708 (W.D. Mo. 1949), *app. diss'd per curiam*, 184 F. 2d 671 (8th Cir. 1950), was an exploding bottle case, the plaintiff being the child of the purchaser of the soda pop, and theory of recovery resting on contract, *i.e.*, breach of the implied warranty of merchantability. In examining applicable state law, the district court found that there would probably be no recovery on the contract theory since this would require extension of the doctrine of implied warranty of merchantability to cover the donee of the vendee of the retail vendor as against the remote manufacturer, which it found an unlikely possibility. It did find, however, that recovery in tort would be permitted under state law. In refusing to dismiss the action, the district court granted leave to the plaintiff to recast the complaint in tort, stating:

> "Though plaintiffs have here cast the cause of action, stated in the complaint, as for breach of implied war-

> ranty, yet it clearly appearing that they have a claim against defendant, under Missouri law in tort, the first defense proffered by the defendant [failure to state a claim] must be denied. If the facts alleged in a complaint reveal that a plaintiff is entitled to any kind of relief, it is sufficient and should not be dismissed." 85 F. Supp. at 714.

In the instant case plaintiff is clearly entitled to recovery at least on a quantum meruit basis, and, if amendment is necessary or desirable, it was an abuse of discretion on the part of the district court to refuse to permit amendment of the complaint.

Unlike most situations, where the moving party must bear the burden of supporting his motion, a motion for leave to amend a pleading requires that the party *contesting* the motion demonstrate why the right to amend should *not* be granted. In *Weil Clothing Co.* v. *Glasser*, 213 F. 2d 296 (5th Cir. 1954), the trial judge refused to admit evidence of loss of profits as an element of damages for breach of contract on the ground that the matter was not covered in the complaint, and he denied permission to amend the complaint. In reversing the district court the Court of Appeals, noting Rule 15(b), which deals with amendments during trial, states that, when a motion for leave to amend is filed, the burden is put upon the other party to satisfy the court that the admission of evidence and amendment of pleadings would prejudice him in maintaining his defense upon the merits. In *South Suburban Safeway Lines, Inc.*, v. *Carcards, Inc.*, 256 F. 2d 934 (2d Cir. 1958), the district court had dismissed an involuntary petition in bankruptcy on the ground that it was "defective for vagueness." The Court of Appeals considered two issues: (1) Whether the petition was so vague as to be defective and (2), assuming

such vagueness, whether the district court should have permitted amendment rather than dismissing the petition outright. On this second issue the court stated:

> "The record in the instant case does not disclose any factors which would justify the district court in refusing to permit amendment of the petition by the appellants and we believe they should be allowed to amend the petition." 256 F. 2d at 936.

In the instant case there was no showing whatever by the defendant of any reason why amendment of the complaint should not have been allowed. Indeed, the courts below seem not to have asked for any such reason; rather, the matter is summarily disposed of by erroneously characterizing the quantum meruit count as "an independent matter" (R. 21). There is no opinion by the district court explaining its denial of leave to amend; and, on this basis, the Court of Appeals finds "nothing presented by the record to show the circumstances which were before the district court for its consideration in ruling on the motions" and it cannot say, therefore, that the district court abused its discretion (R. 15). Nowhere is there a mention of Rule 15 or a discussion of plaintiff's rights under that rule. Even before the advent of the Federal Rules, this Court had "fixed the limits of amendment with increasing liberality." *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933). The courts below have, we submit, acted in disregard of the letter and the spirit of Rule 15.

If extenuating circumstances are necessary before an amendment may be allowed—and we vigorously deny that such is the law—then such circumstances were clearly presented in this case and should have been noticed by the

Court of Appeals. From the memorandum of decision of the district judge (R. 6, esp. 8) as well as the briefs submitted by both parties it was clear that, in framing her complaint, the plaintiff relied on a decision of the First Circuit which stood unreversed, *Cleaves* v. *Kenney*, 63 F. 2d 682 (1933). Plaintiff could assume that a district judge in the Circuit would consider himself bound by that decision (see pp. 12-14 of Brief for Appellant). When, however, the district judge refused to follow the earlier precedent rendered by his superior tribunal and dismissed the complaint, is it not in order that plaintiff be given leave to amend?

Even where not strictly bound to do so, this Court has, when declaring a sudden change in law or settling a previously unsettled question, exercised its sound judicial discretion to give the litigant prejudiced a second chance. See *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group*, 311 U.S. 579 (1941),[19] and *Rorick* v. *Board of Commissioners of Everglades Drainage Dist.*, 307 U.S. 208 (1939).[20] Such a chance, by permitting amendment of the complaint, should have been granted to the plaintiff herein, and denial of leave to amend and the affirmance of such denial constitute clear abuses of judicial discretion calling for reversal by this Court.

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[19] "[I]t would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of *London* v. *O'Dougherty*, *supra*. . . ." 311 U.S. at 582-583.

[20] "Since the time for appeal to the Circuit Court of Appeals has expired, and since the jurisdictional problem determined in this case had not been fully settled prior to this decision, we will not terminate the litigation by dismissing the appeal but . . . we will order the decree vacated and the cause remanded to the district court for further proceedings . . ." 307 U.S. at 213.

Conclusion.

For the reasons stated, it is respectfully submitted that the judgments of the courts below should be reversed and the case remanded to the Court of Appeals with instructions to:

(1) Review on the merits the district court's judgment of dismissal entered December 19, 1960, by determining the issue whether recovery may be had on the express oral contract as pleaded in the original complaint, and thereafter to—

(2) Remand the case to the district court for a trial of the action on a quantum meruit theory of recovery and for such other proceedings as shall be proper, in accordance with the determination by the Court of Appeals of the issue above stated.

Respectfully submitted,

MILTON BORDWIN,
50 Congress Street,
Boston 9, Massachusetts,
Attorney for Plaintiff-Petitioner.

GUTERMAN, HORVITZ & RUBIN,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 41.

LENORE FOMAN,
Plaintiff, Appellant,

v.

ELVIRA A. DAVIS, EXECUTRIX,
Defendant, Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR DEFENDANT, APPELLEE.

ROLAND E. SHAINE,
BROWN, RUDNICK, FREED & GESMER,
85 Devonshire Street,
Boston, Massachusetts,
Attorneys for Defendant, Appellee.

RICHARD R. CAPLES,
161 Harvard Avenue,
Allston, Massachusetts,
Of Counsel.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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MISCELLANEOUS.

Supreme Court of the United States.

October Term, 1962.

No. 41.

LENORE FOMAN,
Plaintiff, Appellant,

v.

ELVIRA A. DAVIS, Executrix,
Defendant, Appellee.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

BRIEF FOR DEFENDANT, APPELLEE.

Counter-Statement of Questions Presented.

1. Whether an appeal to the Court of Appeals is a nullity and properly dismissed as premature if taken from a District Court judgment as to which there is an outstanding motion to vacate and to amend made in the District Court within ten days of entry of the judgment.

2. In the case of a District Court's denial after judgment of motions which in substance are for leave to amend a complaint by adding a count, whether an appeal from such denial is sufficient to bring the judgment itself before the Court of Appeals.

3. Whether the District Court abused its discretion in denying a motion to vacate judgment to permit amendment, and a motion to amend the complaint by adding a count, after the action had been dismissed.

Additional Statutes and Rules Involved.

United States Code, Title 28, § 2107:

". . . [N]o appeal shall bring any judgment . . . before a court of appeals for review unless notice of appeal is filed, within thirty days after entry of such judgment. . . ."

Federal Rules of Civil Procedure, 28 U.S.C.:

"Rule 60.—Relief from Judgment or Order.

. . . . . .

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

"(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective ap-

plication; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

"Rule 73.—Appeal to a Court of Appeals,

"(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law . . . The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: . . . granting or denying a motion under Rule 59 to alter or amend the judgment . . .

"A party may appeal from a judgment by filing with the district court a notice of appeal. . . ."

Counter-Statement of the Case.

The complaint in this action alleged an oral agreement "at or about 1947" (R. 2-3) between the plaintiff and her father, the decedent, Wilbur W. Davis, whereby the plaintiff agreed to assume and pay all expenses for the care, treatment and maintenance of her mother, decedent's first wife, and to look after and care for her as long as she lived, and the decedent, in consideration therefor agreed to make and leave no will, to the end that the plaintiff, as his only child, would receive the share of his estate to which she would be entitled under the intestacy laws of Massachusetts.

The complaint further alleged that the plaintiff performed her part of the agreement until the death of her mother in 1953; that in 1957 the decedent married the defendant, Elvira A. Davis; that Wilbur W. Davis died in 1959, leaving an estate of approximately $60,000 and a will which has been duly probated in Massachusetts and of which the defendant is executrix.

Except for a bequest of $5,000 to his brother, the decedent by the terms of his will "devised and bequeathed" (R. 3-4) his entire estate to the defendant. The plaintiff sought damages in the amount of $40,000, the share of the estate which she would have received as his only child if Wilbur W. Davis had died intestate.

Jurisdiction in the District Court was based entirely on diversity of citizenship (R. 2).

Defendant moved to dismiss in the District Court (R. 6) and, after hearing, judgment was entered on December 19, 1960, dismissing the complaint (R. 9) in accordance with a memorandum of decision which had been previously filed (R. 6).

On December 20, 1960, the plaintiff moved to vacate judgment "in order to permit [her] to file a Motion to

Amend her Complaint by adding a second cause of action" (R. 9) in accordance with an amendment simultaneously proposed (R. 10). The proposed amendment, entitled "Second Cause of Action," alleged that the plaintiff paid money and rendered services for and on behalf of the defendant, Elvira A. Davis.

The plaintiff then filed, on January 17, 1961, notice of appeal to the Court of Appeals from the judgment of December 19, 1960 (R. 11). Later, on January 23, 1961, there was a hearing on petitioner's motions to vacate judgment and to amend her complaint, and both motions were denied that day (R. 2). On January 26, 1961, the petitioner filed a notice of appeal from the denial of her motions (R. 11).

On June 26, 1961, the Court of Appeals dismissed the appeal insofar as taken from the District Court's judgment of December 19, 1960, and affirmed the orders of the District Court of January 23, 1961 (R. 15). On August 17, 1961, a petition for rehearing was denied by the Court of Appeals (R. 22).

Petition for writ of certiorari was filed in this Court on November 14, 1961, and granted on January 8, 1962 (R. 22).

Summary of Argument.

I.

The plaintiff's appeal of January 17, 1961, from the District Court's judgment of dismissal was properly dismissed by the Court of Appeals as premature.

The plaintiff's motion to vacate judgment did not designate under which of the Federal Rules of Civil Procedure it was brought, but, having been brought within ten days after entry of the judgment, the full context of the Rules

dictated that the motion should be deemed to have been made under Rule 59 (e).

As a Rule 59 motion, it terminated the running of the time for appeal and suspended the finality of the judgment, pursuant to Rule 73 (a). In consequence, the appeal, taken while the motion was still pending, was premature and a nullity and was therefore properly dismissed by the Court of Appeals.

II.

The District Court's judgment of dismissal was not brought up for review to the Court of Appeals by the plaintiff's appeal of January 26, 1961, from the District Court's denial of her motions to vacate judgment and amend the complaint.

A. The motion to vacate judgment was explicitly for the purpose of allowing the plaintiff to amend in accordance with her motion to amend.

Viewed as a notice of appeal for the purpose of taking an appeal from the judgment of dismissal, the notice of appeal of January 26, 1961, was deficient because it designated only the District Court orders denying the motions to vacate and amend.

That deficiency cannot be met by reference back to the abortive appeal of January 17, 1961, because it would be contrary both to sound judicial administration and to jurisdictional limitations.

B. Considered by itself, the notice of appeal of January 26, 1961, limited the jurisdiction of the Court of Appeals to a review of the District Court orders denying the motions to vacate and amend.

The Court of Appeals was obliged to determine the extent of its own jurisdiction even though the matter was not raised by any of the parties.

C. Where the intent was not expressed in the notice of appeal of January 26, 1961, to appeal from the judgment of dismissal, that intent cannot be found in "the actions taken and the papers filed by the plaintiff." When she filed the notice of appeal of January 26, 1961, the plaintiff plainly thought she had appealed from the judgment of dismissal by her prior notice of appeal.

III.

The District Court was entirely justified in denying the plaintiff's motions to vacate judgment and amend her complaint.

A. Plaintiff's motion to amend failed to allege any action which related to the allegations of the original complaint. Her explanation is that she made an error. However, under those circumstances sound discretion would not require the District Court to vacate its judgment and allow the amendment.

Furthermore, the District Court should not be adjudged to have abused its discretion in the face of the possibility that outside the record there were further circumstances before it for its consideration in ruling on the plaintiff's motions.

B. The plaintiff says that she could assume that the District Court would consider itself, "bound," in the present case, by the interpretation of Massachusetts statutes set forth in *Cleaves* v. *Kenney*, 63 F. (2d) 682 (C.A. 1st Cir. 1933). On that premise she argues that, because the District Court did not consider the *Cleaves* case to govern in the case at bar, the District Court abused its discretion in denying her motions to vacate judgment and amend her complaint. The District Court, however, came to the carefully considered conclusion that under Massachusetts law the plaintiff's complaint failed to state a claim upon

which relief could be granted. The closeness of the District Court to Massachusetts law would warrant that in the present case its views should not be condemned as an abuse of discretion.

C. Plaintiff asserts an obligation on the part of the District Court to have allowed her motions on the basis that, in view of *Cleaves* v. *Kenney,* the District Court declared "a sudden change in law" or settled "a previously unsettled question." In framing her complaint on the basis of the *Cleaves* case, however, the plaintiff deliberately took the risk that Massachusetts law was not as she conceived it. By means of the *Cleaves* case she hoped to use the diversity jurisdiction of the United States courts to obtain a more favorable decision than she could get in the Massachusetts courts. Sound discretion should not become abuse of discretion because of "the after-thought of a disappointed litigant."

D. Presumably on the assumption that this Court will hold that the plaintiff has perfected an appeal from the District Court's judgment of dismissal, the plaintiff argues that the judgment of dismissal was in error because damages in quantum meruit are recoverable in an action for breach of contract. But it is evident that, quite deliberately, the only claim the plaintiff set forth was a claim on the alleged oral agreement. It is also evident that, with the same deliberateness, she argued on that basis alone in the District Court on defendant's motion to dismiss. As a result, the District Court, in good faith, took her at her word. She should not now be heard to complain.

Argument.

I. Plaintiff's Motion to Vacate Judgment having been Made within Ten Days of Entry of Judgment and Not being Disposed of when Appeal from the Judgment was Taken, That Appeal was a Nullity and was Properly Dismissed as Premature.

Plaintiff argues that the Court of Appeals should have treated her motion to vacate judgment as having been brought under Rule 60,[1] so that then the notice of appeal filed January 17, 1961, would not have been premature and the Court of Appeals would have reached the merits of the judgment entered by the District Court (pp. 14-20).[2]

In making that contention plaintiff resists its implications. If plaintiff's motion to vacate had been treated as brought under Rule 60, thereby leaving the finality of the judgment unaffected, the appeal taken on January 17, 1961, would have been rendered effectual, but at the same time the District Court would have been deprived of jurisdiction to entertain plaintiff's motion to vacate the judgment.

Daniels v. *Goldberg*, 8 F.R.D. 580 (D.C. S.D. N.Y. 1949); affd. 173 F. (2d) 911 (C.A. 2d Cir. 1949).

Switzer v. *Marzall*, 95 F. Supp. 721, 722-723 (D.C. D.C. 1951).

United States v. *Frank B. Killian Co.*, 269 F. (2d) 491, 494 (C.A. 6th Cir. 1959).

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[1] Reference to "Rule" or "Rules" is to the Federal Rules of Civil Procedure, 28 U.S.C.

[2] Page references are to brief for plaintiff if not otherwise indicated.

That posture of affairs would no more have suited the plaintiff than the present situation.

Plaintiff replies (pp. 20-22) that, although the District Court concededly would have been without jurisdiction to grant her motion to vacate while appeal from a final judgment was pending, it would have had "limited jurisdiction" to deny the motion and avoid the possibility of a useless remand by the Circuit Court for the purpose of a hearing of the motion by the District Court.

> Note, "Disposition of Federal Rule 60 (b) Motions During Appeal," 65 Yale L.J. 708, 712-713 (1956).

But that contention fails to meet the issue. "Limited jurisdiction" as such is entirely in keeping with the holding of the Court of Appeals in the present case that a motion to vacate a judgment made within ten days of the judgment should be construed as one under Rule 59 (e) (R. 14). Indeed, the very concept of "limited jurisdiction" underlines the desirability of preserving in all cases the unlimited jurisdiction of the district courts during the period of ten days after entry of judgment pursuant to Rules 59 (e) and 73 (a). The invocation of Rule 59 in combination with Rule 73 accomplishes fully and efficiently whatever "limited jurisdiction" may clumsily accomplish to a small degree. Under "limited jurisdiction" it may be that "a party need not drop his appeal until the lower court has indicated that it will grant the motion, and a potentially prejudicial choice is thus avoided" (Note, "Disposition of Federal Rule 60 (b) Motions During Appeal," 65 Yale L.J. 708, 711 (1956)); but Rule 73 permits a motion, when treated as made under Rule 59, to be granted directly as well as denied, and motions are after all brought with hope, if not always the expectation, that they will be

granted. Indeed, a manifest purpose of Rule 73, in suspending the finality of a judgment upon a timely motion under Rule 59, is to spare litigants entirely from the dilemma of having to choose between the prosecution of an appeal and the prosecution of motions brought after judgment but not disposed of as the appeal period is about to expire.

> See *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177-178 (1944), referred to in Report of Proposed Amendments Prepared by the Advisory Committee on Rules for Civil Procedure, June, 1946, House Document No. 473, 80th Congress, 1st Session, p. 139; *Stevens* v. *Turner*, 222 F. (2d) 352 (C.A. 7th Cir. 1955); and *Gaudiosi* v. *Mellon*, 269 F. (2d) 873, 877 (C.A. 3d Cir. 1959); cert. den. 361 U.S. 902 (1959).

At the same time Rule 73 advances the policy "to have the whole case and every matter in controversy in it decided in a single appeal."

> *McLish* v. *Roff*, 141 U.S. 661, 665-666 (1894). *Baltimore Contractors, Inc.*, v. *Bodinger*, 348 U.S. 176, 178 (1955).

Furthermore, a motion to vacate judgment, construed as a motion under Rule 59, may be considered on the broad grounds appropriate to a motion which suspends the finality of judgment rather than on the extraordinary grounds required by Rule 60.

> *John E. Smith's Sons Co.* v. *Lattimer Foundry & Machine Co.*, 19 F.R.D. 379, 381-382 (D.C. M.D. Penn. 1956); affd. 239 F. (2d) 815 (C.A. 3d Cir. 1956).

From the foregoing we can see why, in the case at bar, to have treated plaintiff's motion to vacate under Rule 60 rather than Rule 59 would have been to subvert the very system of appeals and post-judgment motions so carefully created by Rules 59, 60 and 73; we can see why there can be no quarrel with the view of the Court of Appeals that "the full context of the rules dictates that resort should be made to the procedure under Rule 59 if time for applying such motions has not expired" (R. 14).

Stevens v. *Turner*, 222 F. (2d) 352 (C.A. 7th Cir. 1955).

In the words of this Court in *Kingman* v. *Western Manufacturing Co.*, 170 U.S. 675, 680 (1898):

> "The question before us is merely whether a judgment is final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion . . . We do not think it is . . ."

The finality of the judgment having been suspended by the motion to vacate and that motion not having been disposed of by the District Court when the appeal was taken on January 17, 1961, the appeal was properly dismissed as premature and a nullity.

United States v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944).

Gaudiosi v. *Mellon*, 269 F. (2d) 873, 877 (C.A. 3d Cir. 1959); cert. den. 361 U.S. 902 (1959).

Healy v. *Pennsylvania Railroad Co.*, 181 F. (2d) 934, 936 (C.A. 3d Cir. 1950); cert. den. 340 U.S. 935 (1951).

Reconstruction Finance Corp. v. *Monat*, 184 F. (2d) 44, 48 (C.A. 9th Cir. 19

Studer v. *Moore*, 153 F. (2d) 902 (C.A. 2d Cir. 1946).

Stevens v. *Turner*, 222 F. (2d) 352 (C.A. 7th Cir. 1955).

Lohr v. *United States*, 264 F. (2d) 619 (C.A. 5th Cir. 1959); cert. den. 361 U.S. 814 (1959).

Kelly v. *Pennsylvania Railroad Co.*, 228 F. (2d) 727 (C.A. 3d Cir. 1955); cert. den. 351 U.S. 925 (1956).

II. The Appeal Taken by Plaintiff from the Post-Judgment Orders of the District Court was Insufficient to Bring the Judgment Itself before the Court of Appeals.

Certain provisions of the statutes and rules require consideration at this point.

Section 1291 of Title 28 of the United States Code provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

Section 2107 of Title 28 provides:

> ". . . [N]o appeal shall bring any judgment . . . before a court of appeals for review unless notice of appeal is filed, within thirty days after entry of such judgment . . ."

Rule 73 (a) of the Federal Rules of Civil Procedure provides:

> "A party may appeal from a judgment by filing with the district court a notice of appeal."

Rule 73 (b) provides:

> "The notice of appeal . . . shall designate the judgment or part thereof appealed from . . ."

A. In the foregoing provisions of the statutes and rules is described an objective system for the orderly prosecution of appeals.

It is a system premised, first of all, upon the existence of a "final" decision or judgment. As pointed out above (I, pp. 9-12, *supra*), an appeal taken from a judgment before the judgment has become final is premature and must be dismissed as a nullity.

Beyond the requirement that there be a final decision or judgment, there must be a timely notice of appeal which designates the judgment or part thereof from which appeal is being taken.

In the case at bar the notice of appeal filed January 26, 1961, by the plaintiff designated only the orders of the District Court made on January 23, 1961, denying her motion to vacate judgment and to amend her complaint. The motion to vacate judgment was explicitly "in order to permit the plaintiff to file a Motion to Amend her Complaint by adding a second cause of action . . . in accordance with [the] Motion herewith filed" (R. 9).

Viewed as a notice of appeal for the purpose of taking an appeal from the judgment of December 19, 1960, the notice of appeal of January 26, 1961, is patently deficient as a matter of substance.

Carter v. *Powell*, 104 F. (2d) 428, 430 (C.A. 5th Cir. 1939); cert. den. 308 U.S. 611 (1939).

Gannon v. *American Airlines, Inc.*, 251 F. (2d) 476, 482 (C.A. 10th Cir. 1957).

That deficiency in substance cannot be met, as the plaintiff suggests (pp. 26-29), by means of a transfusion from the ghost of the abortive appeal of January 17, 1961.

We are not dealing here with "one of those technicalities to be easily scorned" (*Radio Station WOW, Inc., v. Johnson*, 326 U.S. 120, 124 (1945)). Regarded as a matter involving nothing more than an application of rules, to the end of achieving sound judicial administration, the following thoughts from *Healy v. Pennsylvania Railroad Co.*, 181 F. (2d) 934, 936-937 (C.A. 3d Cir. 1950); cert. den. 340 U.S. 935 (1951), are appropriate:

> "We are not oblivious of the trend away from those niceties which so often in the past harassed both litigants and the courts. But we are not here insisting upon mere satisfaction of barren formal technicalities. Howsoever liberal we may wish to be, it cannot be gainsaid that certain formalities are indispensable to 'just, speedy, and inexpensive' litigation, and these attributes of our federal judicial system are forthcoming only upon adherence to, rather than upon rejection of, the Rules. It is of the highest importance that the appellate function be free of, and protected from, the needless jurisdictional doubts so simply avoidable by compliance with a few specific instructions. The alternative can but induce a laxity destined to obscure the lines of proper appellate conduct, with consequent expense and hardship to the litigants, whose duty it is in the first instance to see to it that the record is in proper form for the relief sought."

Beyond the application of rules, however, there is a crucial jurisdictional block to the plaintiff's attempt to infuse substance into the appeal of January 26, 1961, from the lifeless appeal of January 17, 1961.

In *Stevens* v. *Turner*, 222 F. (2d) 352, 354 (C.A. 7th Cir. 1955), the court said:

> ". . . [D]efendant's appeal, taken while his motion to amend the judgment was pending, was premature. We acquired no jurisdiction by virtue of it and no after-occurring action or event can inject vitality into it."

In *Lohr* v. *United States*, 264 F. (2d) 619 (C.A. 5th Cir. 1959); cert. den. 361 U.S. 814 (1959), the court said:

> ". . . [A]ppellant says that her appeal of August 25, 1958, even though taken from a non-appealable order, was in the nature of a 'continuing' or a 'suspending' notice of appeal which attached to any final decision in the case; and that either the order granting the voluntary non-suit on December 9 [1958] constituted a final decision or it converted the order dismissing the United States as a party defendant into a final decision with effective date of December 9.
>
> "While in sympathy with appellant's plight, we cannot afford to give the Judicial Code or the Rules of Procedure any such fictional construction. Rule 73 (a), F.R. Civ. P., 28 U.S.C.A., states simply that 'the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from • • •.' (60 days where the United States is a party.) This 'judgment appealed from' must be either a 'final decision' under 28 U.S.C.A. Sec. 1291 or a certain 'interlocutory decision' under 28 U.S.C.A. Sec. 1292. Here, the 'judgment appealed from' was the order of dismissal of August 12, 1958. • • • It was neither a final nor an interlocutory decision of the kind which will support an appeal to this Court. The appeal is therefore dismissed."

B. So far as concerns the notice of appeal filed January 26, 1961, when considered by itself, that notice of appeal itself limited the jurisdiction of the Court of Appeals to review of the orders of January 23, 1961.

> *Donovan* v. *Esso Shipping Co.*, 259 F. (2d) 65 (C.A. 3d Cir. 1958); cert. den. 359 U.S. 907 (1959).

To have given that notice of appeal any wider effect would have enlarged the scope of the review and so would have been a step clearly beyond the discretion which the Court of Appeals has to disregard procedural irregularity of no substance.

> *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group*, 311 U.S. 579, 582-583 (1941).
>
> *Georgia Hardwood Lumber Co.* v. *Compania de Navegacion Transmar, S.A.*, 323 U.S. 334, 336 (1945).

A Court of Appeals must, of course, always satisfy itself as to its jurisdiction even though the matter is not raised by any of the parties.

> *Fleming* v. *Borders*, 165 F. (2d) 101 (C.A. 9th Cir. 1947).
>
> *Oneida Navigation Corp.* v. *W. & S. Job & Company, Inc.*, 252 U.S. 521 (1920).

C. As we have seen (II, A, pp. 14-16, *supra*), the plaintiff did not, in keeping with Rule 73 (b), designate the judgment of December 19, 1960, as being appealed from in

the notice of appeal filed January 26, 1961. We are told, however, in plaintiff's brief (p. 27), that "the intent [in the notice of appeal of January 26, 1961] to appeal from the judgment of dismissal is, in fact, manifested to the appellate court by the actions taken and the papers filed by the plaintiff."

As was said in *Johnson* v. *New York, New Haven & Hartford Railroad Co.*, 344 U.S. 48, 51 (1952), with regard to a motion to set aside a verdict which the moving party said he intended as a motion for judgment or new trial:

> "The defect in this argument is that respondent's motion cannot be measured by its unexpressed intention or wants. . . . Respondent's motion should be treated as nothing but what it actually was . . ."

We advert to the remarks of the Court of Appeals (R. 21-22):

> "Also, militating against plaintiff's position that the second notice of appeal was intended to be an appeal from the original judgment of dismissal is the factor that plaintiff plainly thought she appealed from that judgment by her first notice of appeal. Now that that notice of appeal has been held premature, plaintiff contends that the second notice of appeal is sufficient. We believe, however, that under the principles of the above-cited cases, plaintiff's second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal.
>
> "If plaintiff's second appeal was in her mind intended to encompass the old cause of action rather than, or in addition to, the proposed new one, it was deficient not technically, but in substance."

III. Denial of Plaintiff's Motion to Vacate Judgment so as to Permit her to Amend her Complaint, and Denial of her Motion to Amend her Complaint, were Proper.

A. There is a basic deficiency in the plaintiff's motion to amend which fully justified the District Court's denial of that motion and the concomitant motion to vacate judgment.

A reading of the "Second Cause of Action" proposed by the plaintiff in her motion to amend (R. 10) will disclose at once that it fails to allege any action which relates to the allegations in the original complaint (R. 2). The original complaint, it will be recalled, claims damages for breach of contract from the estate of Wilbur W. Davis on the ground that the plaintiff, *for and on behalf of Wilbur W. Davis*, provided and paid for care and maintenance of his first wife in consideration of his alleged promise, later unfulfilled, to die without making a will. In contrast, the proposed "Second Cause of Action" alleges that the plaintiff paid money and rendered services *for and on behalf of Elvira A. Davis*, the executrix of the will of Wilbur W. Davis. Obviously, allowance of the plaintiff's motion to amend would not have enabled her to recover for any money or services she may have ever paid or rendered for or on behalf of Wilbur W. Davis.

See *Shopneck* v. *Rosenbloom*, 326 Mass. 81, 82 (1950).

Turner v. *White*, 329 Mass. 549, 553 (1952).

In her brief (p. 31, n. 18) plaintiff says the references to "defendant" in the proposed amendment were an "obvious slip" and were intended to read "decedent." But, as with plaintiff's second notice of appeal (pp. 17-18, *supra*),

the motion "cannot be measured by its unexpressed intention or wants."

Johnson v. *New York, New Haven & Hartford Railroad Co.*, 344 U.S. 48, 51 (1952).

Certainly sound discretion did not require the District Court to vacate its judgment and allow an amendment which, to say the least, would have to be amended again.

What was said in oral argument at the hearing on plaintiff's motions before the District Court is not part of the record in this case, and it would be out of order to give an account here. Suffice it to say that the precise point just set forth may well have been raised and discussed, and then spurned by the plaintiff, at that hearing. Therein lies the wisdom of the position taken by the Court of Appeals that "there is nothing presented by the record to show the circumstances which were before the district court for its consideration in ruling on the motions" (R. 15).

Plaintiff complains (p. 39) that the District Court filed no opinion explaining its denial of the motion to amend. But no explanation was necessary; the motion speaks for itself.

B. Notwithstanding the deficiency in her motion to amend, just discussed (A, *supra*), the plaintiff insists that the District Court denied her due liberality in the matter of amending her complaint, particularly in view of *Cleaves* v. *Kenney*, 63 F. (2d) 682 (pp. 35-40).

Cleaves v. *Kenney* was decided by a divided court in 1933 by the Circuit Court of Appeals for the First Circuit. It held an oral agreement to destroy a will to be enforceable. Of course, such was not the agreement which the plaintiff here alleged.

Whatever the import of *Cleaves* v. *Kenney* on its precise facts, however, the case at bar being in the federal courts

only because of diversity of citizenship, the function of the District Court was to look to the Massachusetts statutes and the decisions of the Massachusetts Courts, just as in a case heard in a court of Massachusetts, and from them determine what rights, if any, the plaintiff had.

> *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108 (1945).

That the District Court fully and conscientiously performed its function is manifest from its Memorandum of Decision on Defendant's Motion to Dismiss (R. 6).

It is appropriate to consider that, although *Cleaves* v. *Kenney* may have involved "what were known as matters of 'local' law" prior to *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) (*Ruhlin* v. *New York Life Insurance Co.*, 304 U.S. 202, 209 (1938)), it was decided prior to the *Erie Railroad Co.* case, and, even in its own day, on its own particular facts, *Cleaves* v. *Kenney* was decided under the shadow of a vigorous dissent. It was the carefully considered conclusion of the District Court that in today's light, including that of a recent Massachusetts decision, the decision in *Cleaves* v. *Kenney* should not be extended to the case at bar. This Court has observed that a result of the *Erie Railroad Co.* case is to require "a sharper analysis of what federal courts do when they enforce rights that have no federal origin."

> *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 112 (1945).

Where "[t]he precise issue of state law involved . . . is one which has not been decided by the . . . [state] courts," this Court has said, in *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949):

> "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."

The closeness of the District Court to Massachusetts law would warrant that in the present case its views should not be condemned as an abuse of discretion.

United States v. *Durham Lumber Co.*, 363 U.S. 522, 527 (1960).

C. In her brief (p. 40) the plaintiff contends that, in view of *Cleaves* v. *Kenney*, 63 F. (2d) 682 (C.A. 1st Cir. 1933), the ruling of the District Court on her motions to vacate judgment and amend was such "a sudden change in law," or such a "settling" of "a previously unsettled question," that the District Court was required to allow those motions as a matter of law.

Disregarding for present purposes the basic deficiency in plaintiff's motions which is pointed out above (A, pp. 19-20, *supra*), it is utterly apparent that the plaintiff made a conscious choice in framing her complaint exclusively as an action on the alleged agreement rather than as both an action on the agreement and an action in quantum meruit. That is the whole of the contention in her brief (p. 40):

> "From the memorandum of decision of the district judge (R. 6, esp. 8) as well as the briefs submitted by both parties it was clear that, in framing her complaint, the plaintiff relied on a decision of the First Circuit which stood unreversed, *Cleaves* v. *Kenney*, 63 F. 2d 682 (1933). Plaintiff could assume that a district judge in the Circuit would consider himself bound by that

> decision (see pp. 12-14 of Brief for Appellant). When, however, the district judge refused to follow the earlier precedent rendered by his superior tribunal and dismissed the complaint, is it not in order that plaintiff be given leave to amend?"

Also to be noted is the plaintiff's statement of the case at page 6 of her brief:

> "In setting forth her cause of action in a single count based upon the oral agreement, plaintiff relied upon *Cleaves* v. *Kenney* . . ."

The choice made by the plaintiff involved an obvious risk of the ever-present possibility that the Massachusetts law was not as she conceived it to be. Persuasive, even convincing, as the majority opinion in *Cleaves* v. *Kenney* may have seemed to the plaintiff, it could only dispose of that particular case. It could not settle the proper construction of the Massachusetts statutes.

> *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 5, 74 (1937).

Indeed, the plaintiff's choice must be said to have been a deliberate, calculated choice, in which she carefully selected the federal forum for the intended purpose of exploiting what she considered to be a fortuitous opportunity and in which she consciously eschewed a count in quantum meruit in favor of a bold attack. She was "shopping for a favorable forum" (*Eager* v. *Kain*, 158 F. Supp. 222 (E.D. Tenn. S.D. 1957)), a "die-hard" refusing to recognize that *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), has long since ended the day "that a litigant in cases where federal jurisdiction is based only on diverse citizenship

may obtain more favorable decision by suing in the United States courts."

> *York* v. *Guaranty Trust Co.*, 143 F. (2d) 503, 529, 531 (C.A. 2d Cir. 1944), quoted favorably upon review, *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 111 (1945).

Sound discretion, least of all in the case of a claim of the nature here presented, does not require that a litigant should be relieved of the consequences of a conscious, deliberate, calculated, free choice which hindsight indicates was wrong. To borrow a phrase, the plaintiff's cry of abuse of discretion sounds like "the after-thought of a disappointed litigant."

> *Delman* v. *Federal Products Corp.*, 251 F. (2d) 123, 126 (C.A. 1st Cir. 1958).

D. In her brief (pp. 32-35) the plaintiff has made an extended argument to the effect that damages in quantum meruit are recoverable in an action for breach of contract. It is an argument which assumes that the plaintiff has perfected an appeal from the District Court's judgment of dismissal. But whether the plaintiff has perfected such an appeal is, of course, a major issue in this case (I and II, pp. 9-18, *supra*).

It is in any event evident from plaintiff's own brief (p. 40), as quoted above (C, pp. 22-23), that, quite deliberately, the only claim she set forth was on the alleged oral contract, and that, with equal deliberateness, she argued on that sole basis in the District Court on the defendant's motion to dismiss. It is evident, too, from its Memorandum of Decision (R. 6) that the District Court took the plaintiff at her

word and, in good faith, proceeded accordingly. The plaintiff has no cause to complain now.

Conclusion.

On the basis of the foregoing argument it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ROLAND E. SHAINE,
BROWN, RUDNICK, FREED & GESMER,
85 Devonshire Street,
Boston, Massachusetts,
Attorneys for Defendant, Appellee.

RICHARD R. CAPLES,
161 Harvard Avenue,
Allston, Massachusetts,
Of Counsel.